77

Supreme Court, U.S.
FILED
07-818 DEC 18 2007
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding—in conflict with seven of its sister circuits—that a criminal defendant who enters a plea agreement containing a waiver of the right to appeal also forfeits the protections recognized by this Court in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which held that if the defendant requests an appeal and counsel fails to file a timely notice of appeal, the defendant is entitled to habeas relief in the form of a new direct appeal without first being required to show that the forfeited appeal would have had merit.

PARTIES TO THE PROCEEDINGS

Petitioner Armando Nunez was the petitioner-appellant under 28 U.S.C. § 2255 in the courts below. The United States was the respondent-appellee below. There are no other parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

PARTIES TO THE PROCEEDINGS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

I This Court has held that counsel's failure to honor a client's wish to take an appeal is *per se* ineffective assistance and entitles the petitioner to relief in the form of a new direct appeal 11

A. This Court's cases vest the defendant himself with the right to decide whether to appeal 11

B. A defendant for whom a requested appeal was never filed is entitled to relief under Section 2255 in the form of a new direct appeal 13

C. The Seventh Circuit's decision is contrary to the reasoning of this Court's decision in *Flores-Ortega* 16

II The circuits are now split on whether *Flores-Ortega* applies in cases involving appeal waivers. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES:

Anders v. *California*,
386 U.S. 738 (1967) 9, 12, 20

Campusano v. *United States*,
442 F.3d 770 (2d Cir. 2006)..... 18-19, 21-22

Douglas v. *California*,
372 U.S. 353 (1963) 11, 12, 16

Evitts v. *Lucey*,
469 U.S. 387 (1985) 11

Faretta v. *California*,
422 U.S. 806 (1975) 13

Gomez-Diaz v. *United States*,
433 F.3d 788 (11th Cir. 2005) 19, 22

Halbert v. *Michigan*,
545 U.S. 605 (2005) 18

Herrmann v. *United States*,
No. 05-3277, 2007 WL 2700161
(C.D. Ill. Sept. 10, 2007)..... 22, 23

Jones v. *Barnes*,
463 U.S. 745 (1983) 13, 14

McKane v. *Durston*,
153 U.S. 684 (1894) 11

Peguero v. *United States*,
526 U.S. 23 (1999) 14

Pennsylvania v. *Finley*,
481 U.S. 551 (1987) 11

Penson v. *Ohio*,
488 U.S. 75 (1988) 12, 16

Rodriquez v. *United States*,
395 U.S. 327 (1969) 14, 15

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) ..... *passim*

Salas v. *United States*,
No. IP 05-111-H/F-CR-01,
2007 WL 3286611
(S.D. Ind. Nov. 6, 2007) 22

Smith v. *Robbins*,
528 U.S. 259 (2000) 15

Strickland v. *Washington*,
466 U.S. 668 (1984) 11-12

United States v. *Cronic*,
466 U.S. 648 (1984) 12

United States v. *Garrett*,
402 F.3d 1262 (10th Cir. 2005) 18, 19, 22

United States v. *Poindexter*,
492 F.3d 263 (4th Cir. 2007) 19, 20

United States v. *Sandoval-Lopez*,
409 F.3d 1193 (9th Cir. 2005) 19

United States v. *Tapp*,
491 F.3d 263 (5th Cir. 2007) 19, 22

Watson v. *United States*,
493 F.3d 960 (8th Cir. 2007) 18, 19, 20

STATUTES:

18 U.S.C. § 2 3

18 U.S.C. § 3742 11

21 U.S.C. § 841 3

21 U.S.C. § 846 3

28 U.S.C. § 1291 11

28 U.S.C. § 2255 ..... *passim*

INTRODUCTION

This case provides the Court with an opportunity to resolve an important conflict among the circuits with respect to a criminal defendant's appeal rights. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court held that when a defendant asks for an appeal, his counsel's failure to file a timely notice of appeal constitutes ineffective assistance of counsel, is presumptively prejudicial, and entitles the defendant to a new direct appeal—without any requirement that he first show his appeal would have been meritorious. As discussed below, seven circuits have held that *Flores-Ortega* applies even where the defendant's guilty plea entailed a waiver of the right to appeal.

The Seventh Circuit has now departed from that rule, holding that even on the assumption that counsel failed to file an appeal following an express request by the defendant, the defendant is not entitled to a new, out-of-time appeal if the plea agreement contained a valid waiver of the right to appeal. Although the Seventh Circuit attempted to mitigate the conflict by holding alternatively that the relief was barred by the plea agreement's waiver of collateral review as well as direct appeal, that issue is a distraction. Collateral review waivers were also present in the cases in at least four of the seven courts of appeals who have reached the opposite result.

The Seventh Circuit's harsh and unprecedented decision conflicts with principles articulated by this Court and applied under similar circumstances by all of the other circuits to consider the issue. This Court has long recognized that the decision whether to initiate a direct appeal belongs to the defendant, not to his counsel. Petitioner urges this Court to grant review in this case to resolve this stark dispute about

whether and how that basic principle applies in the context of appeal waivers.

OPINIONS BELOW

The Seventh Circuit's opinion affirming the decision of the district court is reprinted in the appendix to this petition ("App.") at 1a-9a, and is reported at 495 F.3d 544 (7th Cir. 2007). The opinion of the district court (App. 10a-17a) is available on the Westlaw electronic database as 2005 WL 2675043 (N.D. Ill. Oct. 15, 2005). The Seventh Circuit's order denying rehearing *en banc* (App. 18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2007, and the order of the court of appeals denying Petitioner's timely petition for rehearing *en banc* was entered on September 19, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This Petition involves the Sixth Amendment of the United States Constitution, the relevant portion of which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

STATEMENT

Armando Nunez is an individual of Mexican heritage who speaks little English. He pleaded guilty to various drug possession and distribution offenses. The plea agreement he signed waived his right to appeal or collaterally attack his sentence, except on the basis that the waiver was involuntary or tainted by ineffective assistance of counsel.

After sentencing, Nunez asked his lawyer to appeal, but his lawyer did not do so. Nunez later filed a habeas petition in which he alleged, inter alia, that he had told his attorney he wished to file an appeal and argue that he had not understood his plea agreement. Nunez's habeas petition was denied without an evidentiary hearing, and the Seventh Circuit affirmed on the basis that the record showed that Nunez's waiver of the right to appeal and to collateral review was valid and should be enforced.

The Plea Agreement. Nunez was indicted on two counts of conspiring to possess with intent to distribute and conspiring to distribute in excess of five kilograms of mixtures including cocaine in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2, and one count of distributing more than half a kilogram of mixtures including cocaine in violation of 21 U.S.C. § 841(a)(1). He initially pleaded not guilty, and defense attorney John M. Cutrone appeared on his behalf

Subsequent plea negotiations between Cutrone and the government resulted in an offe that Cutrone thought suitable. Cutrone Aff. at 3. Nunez would plead guilty to one of the conspiracy counts, and the government would voluntarily dismiss the remainder and recommend a sentence at the low end of the applicable range. *Id.* at 2-3. The plea would also likely entitle him to beneficial treatment under the Sentencing Guidelines.

Cutrone recommended that Nunez accept the offer. According to an affidavit by Cutrone filed during the habeas proceedings, Nunez had established a proficiency in English and indicated that he understood and agreed with Cutrone's conclusion that the government's case was strong and that it would be best

to accept the government's offer. *Id.* at 3, 5. Nunez, however, later contended that he had no interpreter during plea negotiations and that "there was nothing in the plea . . . that [Nunez] actually understood while signing the documents." Supp. to Nunez § 2255 Pet. at 2.

The plea agreement included a waiver provision stating that by pleading guilty, Nunez (1) "waiv[es] all appellate issues that might have been available if he exercised his right to trial"; (2) "waives the right to appeal any sentence within the maximum provided [by] statute . . . , or the manner in which that sentence was determined"; and (3) "waives the right to challenge his sentence or the manner in which it was determined in any collateral attack." Nunez Plea Agreement at 11. The waiver states that it "does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or its negotiation." *Ibid.*

The Guilty Plea. At his change-of-plea hearing, aided by an interpreter, the district court received Nunez's guilty plea and questioned him to confirm that the plea was knowing and voluntary and that Nunez was in fact guilty. When asked whether his plea agreement had been read to him in Spanish, Nunez answered "no," an answer that Cutrone qualified by stating that Nunez and he had reviewed the plea agreement in English and that Cutrone had asked him repeatedly if he understood. The court then asked Nunez a series of questions in English, to many of which Nunez answered a simple "Yes." Those included:

- whether Nunez had had the services of an interpreter to help him communicate with Cutrone;

- whether Cutrone had explained the charges and their consequences to Nunez's satisfaction;
- whether Nunez was "convinced" that he understood the provisions of the plea agreement and was satisfied with it having been read for him in English rather than Spanish;
- whether Nunez was in fact guilty of the charges;
- whether Nunez was pleading guilty voluntarily;
- whether Nunez understood he was waiving his right to appeal or collateral review on any ground other than involuntariness or ineffective assistance of counsel in the negotiation of the waiver.

Gov't Appellee Br. at 7-9. When asked whether he was satisfied with Cutrone's representation, Nunez answered "So far, yes." *Id.* at 7. The court then accepted the plea.

The Sentencing. Nunez was sentenced on June 10, 2003. By that time Cutrone had withdrawn, and Nunez was represented by attorney Robert L. Rascia. Counsel's sole motion at this hearing was for an extraordinary circumstances downward departure. This motion was denied.

The court sentenced Nunez to 135 months followed by a period of supervised release. This sentence was above the statutory minimum but at the bottom end of the applicable guidelines range. On the record, the government suggested that the court inform Nunez that he had ten days to file an appeal to the extent he had not waived his rights of appeal. The court declined to do so specifically, explaining that "[i]t is my understanding that there was a full wa[iv]er of direct appeal" and "I think it confuses the

issue if you tell him he possibly has the right." Sentencing Hrg. Tr. at 11-12.

According to Nunez, he then asked his counsel to file an appeal, but no timely notice of appeal was ever filed on his behalf.

The Habeas Petition. On May 13, 2004, Nunez filed a *pro se* petition pursuant to 28 U.S.C. § 2255. Among other things, the petition alleged that "Counsel failed to file Notice of Appeal." § 2255 Pet. at 5-6. In a supplemental filing, Nunez elaborated by alleging that he "felt he entered into the waiver involuntarily and wished to appeal" based on ineffective assistance of counsel. According to Nunez, his counsel had promised to file the notice of appeal but failed to do so. Supp. to § 2255 Pet. at 2. Citing *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), Nunez argued that this was *per se* ineffective assistance of counsel entitling him to relief. He also complained of the lack of an interpreter during plea negotiations. In an affidavit filed with the court, Cutrone denied that Nunez had expressed any interest in an appeal.

The District Court Decision. The district court denied Nunez's petition. The court rejected most of the arguments in the *pro se* petition as either meritless, subject to the waiver of collateral review contained in the plea agreement, or "confusing . . . [and] not cognizable." App. 12a-13a. The court went on to acknowledge Nunez's argument that he told counsel to file a notice of appeal and that counsel failed to file one. *Id.* at 13a. The court also noted Nunez's contention that he had wished to raise the involuntariness of his plea on direct appeal. *Ibid.* But instead of resolving the factual dispute about whether Nunez asked for an appeal, the district court concluded that counsel's

"failure to file an appeal" was moot because the district court itself would "incorporate his voluntariness arguments into the pending § 2255 petition," *id.*, deciding the issue based on Nunez's *pro se* submissions and under the standards governing requests for habeas relief. The district court's decision did not cite *Flores-Ortega*.

The district court concluded that Nunez's plea and waiver were voluntary. It rejected his argument that he had understood "nothing" in his plea agreement based on his testimony at the change of plea hearing where an interpreter was present; his failure to raise any objection at sentencing; Cutrone's affidavit attesting that Nunez could communicate in English; and the fact that Nunez's filing consisted of "complex words and ideas in cogent English." *Id.* at 13a-15a. The court did not discuss or consider the possibility that Nunez's habeas papers had been prepared with the assistance of other inmates in the prison where he was incarcerated.

The Seventh Circuit's Decision. Nunez appealed and was granted a certificate of appealability. His papers on appeal (again, submitted *pro se*) emphasized the impact of counsel's failure to file a notice of appeal, thus denying him the opportunity to present his involuntariness argument in an appeal as of right. Nunez also argued that to the extent there was a factual dispute as to whether he requested a notice of appeal, the Seventh Circuit should remand for an evidentiary hearing on the issue.

The Seventh Circuit affirmed. See App. 1a-8a. In an opinion authored by Chief Judge Easterbrook, the court held that even if Nunez had, in fact, expressly requested an appeal, his counsel's failure to file one did not entitle him to a new, out-of-time appeal.

The court first acknowledged one key difference between direct and collateral review—noting that because of Nunez's failure to attempt to withdraw his plea in the district court, any issues raised on the direct appeal would have been subject to plain error review. On collateral review, counsel's failure to take a direct appeal meant, in practical effect, that Nunez would be required to show cause and prejudice for his claim of involuntariness. Standards of review aside, however, the court announced that Nunez would lose "on *any* standard."

Assuming for the purposes of decision that Nunez did ask counsel to file a notice of appeal, the court held that because Nunez had testified under oath before the trial court that his plea was voluntary and that he understood the plea agreement's provisions, the appeal waiver was effective. *Id.* at 2a-3a. The court acknowledged that "[i]f the plea was involuntary, then the waiver falls because it is part of the whole package." *Id.* at 2a. But because it believed the plea was voluntary, the court held that "the waiver must be enforced. And the waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." *Id.* at 3a.

The court acknowledged that several federal circuits had held "that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on his client's request." *Ibid.* The court also noted that "[a] defendant who wants a lawyer to argue on appeal that the plea was involuntary has a right to that legal assistance," and that a waiver does not bar appeal on grounds beyond the waiver's scope. *Id.* at 4a. Furthermore, in the Seventh Circuit's opinion, a bright-line requirement that counsel file a notice of appeal whenever the client requested one would perhaps be a useful addition to the Rules of Criminal Procedure,

but the court doubted that it was a constitutional requirement. It was "[u]sually . . . true," the court explained, that as *Flores-Ortega* concluded, counsel's failure to file a requested notice of appeal "cannot be considered a strategic decision [because] filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Id.* at 5a. But "filing cannot be called 'ministerial' when the defendant has waived any entitlement to appeal, not only in the plea agreement but also in open court." *Ibid.* In part this was because "a lawyer has a duty to the judiciary to avoid frivolous litigation." *Ibid.* But it was also because an appeal with no chance of success could jeopardize benefits under a plea bargain. *Id.* at 5a-6a. Therefore, according to the court, "counsel's duty to protect his client's interests militates against filing an appeal" in such a situation: "Protecting a client from a layperson's folly is an important part of a lawyer's job." *Id.* at 6a-7a.

The Seventh Circuit conceded that "[o]rdinarily a lawyer cannot make an independent decision about whether an appeal would be frivolous" and instead must file an *Anders* brief to obtain a court's agreement that counsel may withdraw because the appeal is frivolous. *Id.* at 6a. But "the *Anders* procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach." *Ibid.*

After disagreeing with the rule followed by other circuits, the Seventh Circuit attempted to articulate an alternative holding that would not entail taking a position on the other circuits' conclusions. *Id.* at 7a. The court pointed to Nunez's waiver of the right to collateral review, which was part of the plea that the

BEST AVAILABLE COPY

court had already determined to be voluntary; the court noted that any claim to ineffective assistance other than one challenging the negotiations of the waiver itself was within the scope of that waiver. Because any post-plea ineffective assistance (such as the failure to file a notice of appeal) could not retroactively taint the plea negotiations, Nunez's ineffective assistance argument was no challenge to the validity of the waiver and was barred by it. *Id.* at 7a-8a.

Therefore "whether or not his lawyer should have filed an appeal on demand," the court held that Nunez's waiver barred collateral review on that basis. *Id.* at 8a. The court failed to acknowledge, however, that in four decisions in which the court of appeals had reached the opposite result, collateral review waivers were also present. See *infra* at 21.

REASONS FOR GRANTING THE PETITION

The right to appeal and the right to have the assistance of counsel on appeal are of little use to a criminal defendant whose appeal has been forfeited through attorney error. In *Roe* v. *Flores-Ortega*, this court reaffirmed the "long held [principle] that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." 528 U.S. 470, 477 (2000). It also confirmed that a criminal defendant whose appeal has been forfeited through such attorney error is entitled to receive a new direct appeal without first needing to show that the appeal would have merit. *Id.* at 484. Thus *Flores-Ortega* places the decision whether to file an appeal squarely in the hands of the defendant himself and protects that right by ensuring relief if counsel fails to honor his client's wishes.

The circuits are now divided about whether *Flores-Ortega* applies in cases where the defendant entered a guilty plea that included a waiver of further review. This Court's intervention is needed to resolve this issue and to prevent any further erosion of a defendant's right to decide whether to lodge an appeal.

I. This Court has held that counsel's failure to honor a client's wish to take an appeal is *per se* ineffective assistance and entitles the petitioner to relief in the form of a new direct appeal.

An understanding of the current conflict in the law first requires a review of this Court's cases on the rights to appeal and to the assistance of counsel. As this discussion shows, even if the Seventh Circuit's decision had been the first to address the question presented in this case, its outcome would be at odds with this Court's cases. That itself would be sufficient to call for certiorari review.

A. This Court's cases vest the defendant himself with the right to decide whether to appeal.

A criminal defendant's right to appeal from a federal conviction and sentence is statutory in nature. See 18 U.S.C. § 3742; 28 U.S.C. § 1291; *McKane* v. *Durston*, 153 U.S. 684, 687 (1894) (Constitution does not guarantee a right to direct appeal). The defendant does have a constitutional right to counsel on any direct appeal, see *Douglas* v. *California*, 372 U.S. 353 (1963), and to effective assistance from such counsel, see *Evitts* v. *Lucey*, 469 U.S. 387 (1985). That right does not arise in post-conviction collateral review. *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

The standard for ineffective assistance of counsel claims is clear. In *Strickland* v. *Washington*, 466 U.S. 668, 688-94 (1984), this Court held that a criminal defendant's right to counsel under the Sixth

Amendment is violated when counsel's performance falls "below an objective standard of reasonableness" and such deficient performance prejudices the defendant. Prejudice is presumed if, among other things, there is a "complete denial of counsel. . . . at a critical stage." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The complete denial of the right to counsel on appeal falls into this category and entitles a defendant to a new appeal without any showing of prejudice. See *Penson* v. *Ohio*, 488 U.S. 75, 88 (1988).

The right to counsel on appeal is qualified by the principle that a defendant does not have the right to pursue an appeal that is frivolous. *Penson*, 488 U.S. at 83 (frivolousness necessarily triggers "a limited exception to the requirement articulated in *Douglas*"). This Court's framework for balancing the defendant's rights with counsel's obligation not to pursue a frivolous appeal is set forth in *Anders v. California*, 386 U.S. 738 (1967). Under *Anders*, counsel must conduct "a conscientious examination" of the case and, if convinced the appeal is frivolous, should request leave to withdraw from the case in a brief that "refer[s] to anything in the record that might arguably support the appeal." *Id.* at 744. At that point, the defendant is afforded an opportunity to respond, and the court of appeals must conduct its own "full examination of all the proceedings, to decide whether the case is wholly frivolous." *Ibid.* Thus the proper course for a defense lawyer who is asked to file an appeal—but who questions whether there is any nonfrivolous ground for doing so—is to file the notice of appeal first and then consider the arguments and file an *Anders* brief if appropriate.

This precedent reflects the fact that there are some decisions so important and personal that they are reserved to the client alone. Even though *which* issue

to brief on appeal is a strategic decision not reserved to the client, the decision *whether* to appeal is a "fundamental decision[]" which "the accused has the ultimate authority to make." *Jones* v. *Barnes,* 463 U.S. 745, 751 (1983).

The right to decide whether to appeal—even over contrary advice from counsel—is analogous, and arguably equally as "personal," as the right to proceed *pro se.* See *Faretta* v. *California*, 422 U.S. 806, 834 (1975) ("It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored . . . ."). This right should not be denied to the criminal defendant merely because counsel believes an appeal would fail—or even because counsel believes that pursuing an appeal may be more harmful than helpful to his client. See App. 7a (characterizing Nunez's appeal as "[t]he sort of appeal . . . where the defendant can . . . . [only] lose but not gain"). Thus, while a defense lawyer may have an ethical obligation to advise his client about the potential risks of proceeding with an appeal—including, for example, the risk of losing some of the benefit of a negotiated plea agreement—the lawyer may not simply make the decision for him.

B. A defendant for whom a requested appeal was never filed is entitled to relief under Section 2255 in the form of a new direct appeal.

In *Roe* v. *Flores-Ortega*, this Court reaffirmed these basic principles and held that a habeas petitioner is entitled to a new appeal if he can show that defense counsel improperly failed to file a notice of appeal and that his failure led to the forfeiture of an appeal that the defendant would otherwise have pursued. 528 U.S. 470, 477-81, 481-86 (2000). The defendant's

right to habeas relief does not turn on whether he has already demonstrated to the court on collateral review that his appeal would have been meritorious. *Id.* at 486.

The defendant in *Flores-Ortega* pleaded guilty to murder. Afterward, counsel declined to consult with his client about the possibility of appeal and failed to file a timely notice of appeal. *Id.* at 473-75. The case reached this Court in the context of the petitioner's unsuccessful bid for collateral relief.

The Court reasoned that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds to appeal), *or* (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480 (emphasis added). The starting point of this analysis was the "long held [principle] that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477; see also *Peguero* v. *United States*, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit" (citing *Rodriquez* v. *United States*, 395 U.S. 327, 329-30 (1969))). Again, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . *take an appeal*." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (emphasis added). "[A] defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice [and] [c]ounsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a

purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Flores-Ortega*, 528 U.S. at 477.

Thus, before the Court in *Flores-Ortega* even grappled with how to determine when a lawyer has a duty to consult with the client about whether to appeal, the Court recognized that if counsel *does* consult and the client *does* request an appeal, "the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478.

The discussion of the issue of prejudice in *Flores-Ortega* is also instructive. According to the Court, prejudice in this context does not turn on whether the defendant would have *prevailed* on appeal. Instead, it turns on whether the defendant would have *pursued an appeal* if his counsel had only conferred with him about it. *Id.* at 484. If counsel's deficient performance cost the defendant his ability to have a direct appeal, prejudice is presumed. *Id.* at 484-86.

The defendant's inability to demonstrate the merit of the forfeited appeal does not foreclose the possibility that he would have insisted (or did, in fact, insist) on an appeal even after discussing the issues with counsel. *Id.* at 486; see also *Rodriquez*, 395 U.S. at 330 (defendant whose counsel failed to file a requested notice of appeal should not be denied a new appeal based on his "failure to specify the points he would raise were his right to appeal reinstated" because such a defendant has been "deprived of the[] only chance to take an appeal even though [he] ha[s] never had the assistance of counsel in preparing one"); cf. *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (prejudice is presumed where defendant was altogether denied the right to counsel on appeal). Indeed,

it would be unfair to force an indigent, *pro se* defendant to identify meritorious grounds for appeal when no "advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega*, 528 U.S. at 486.[1]

To be sure, *Flores-Ortega* does not make the merits of the appeal altogether irrelevant—in that a lawyer's failure to consult with his client about the possibility of appeal may not fall below the level of unreasonableness if it was apparent that any appeal would have been frivolous. But *Flores-Ortega* also made clear that counsel *must* consult with his client—regardless of the merits of an appeal—when "this particular defendant reasonably demonstrated" an interest in appeal. 528 U.S. at 480. And the duty to consult must encompass a duty to respect the client's wishes; it would make little sense if the Constitution required a lawyer to consult with his client but permitted him to ignore the client's decision.

C. The Seventh Circuit's decision is contrary to the reasoning of this Court's decision in *Flores-Ortega*.

Under *Flores-Ortega*, then, the only question is whether the defendant would have chosen to appeal. The merits of the appeal are not important if the defendant expressly stated that he wanted to file an appeal and asked counsel to do so. But the merits of the appeal are what dominated the Seventh Circuit's

---

[1] See also *Douglas*, 372 U.S. at 356 ("Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required."); *Penson*, 488 U.S. at 87 ("Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process.").

analysis in this case, despite the court's assumption that Nunez had, in fact, demanded an appeal. According to the Seventh Circuit, Nunez's appeal was barred by his appeal waiver, and "an appeal in the teeth of a valid waiver is frivolous." App. 5a. The Seventh Circuit's treatment of the merits of the forfeited appeal is thus inconsistent with *Flores-Ortega*.

Further, *Flores-Ortega* contemplates that even where the defendant pleaded guilty and waived certain appeal rights, the lawyer still may be required to consult with his client about the possibility of appeal:

> Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

528 U.S. at 480. This analysis would be pointless if, as the Seventh Circuit suggests, an appeal waiver necessarily abrogates any duty to file a notice of appeal.

Moreover, the Seventh Circuit's consideration of the merits of Nunez's appeal was itself fundamentally flawed and reflects the real and practical implications of the *Flores-Ortega* decision. In a direct appeal, Nunez would have been entitled to counsel to investigate potential claims and arguments and present them to the court. Here, by contrast, the Seventh Circuit considered the merits of the appeal and the "voluntariness" issue based only on the papers of a *pro se* litigant, given that Nunez had no right to counsel in

bringing his habeas petition. A defendant's right to a counseled direct appeal should not turn on whether he can identify meritorious challenges to his appeal waiver *without* the assistance of counsel. *Cf. Halbert* v. *Michigan*, 545 U.S. 605, 621 (2005) ("Appeals by defendants convicted on their pleas may involve myriad and often complicated substantive issues, and may be no less complex than other appeals." (citations and internal quotation marks omitted)). To the contrary, a defendant who has decided to challenge a plea agreement needs the advice of counsel no less than a defendant who took his case to trial.

In addition, as the Seventh Circuit acknowledged, the petitioner's burden in a habeas proceeding is quite different from the burden he would need to carry on the same issue in a direct appeal. Here, for example, because Nunez did not move to withdraw his plea in the trial court, "[o]n direct appeal the standard would have been plain error, but on collateral attack the forfeiture is complete and the petitioner must meet the higher standard of cause and prejudice." App. 2a (citations omitted). For that very reason, other circuits have explained that examining a potential direct appeal issue through the lens of Section 2255 is inappropriate and cannot be a substitute for the direct appeal itself. *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007) ("The 'limited perspective of collateral review' is not the appropriate vantage point from which to assess whether Watson might have any meritorious issues that can be raised on appeal in spite of his waiver.") (quoting *United States* v. *Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) ("We decline to adopt a rule that would allow courts to review hypothetical appeals as a substitute for real appeals that have been

blocked by attorney error."). In the instant case, of course, the Seventh Circuit went on to surmise that the standard would not matter and that Nunez's substantive argument about the involuntariness of his plea would fail on its merits either way. App. 2a. But once again, the merits of these claims should not have been considered at all, particularly when Nunez had not had the benefit of counsel to develop the arguments, as he would have had on direct appeal.

In short, the reasoning of the decision below is irreconcilable with the reasoning of *Flores-Ortega*. That alone would be a sufficient basis for a grant of certiorari, even apart from the clear and well-articulated split among the circuits on this issue.

II. The circuits are now split on whether *Flores-Ortega* applies in cases involving appeal waivers.

The Seventh Circuit's decision creates a stark conflict among the circuits on the application of *Flores-Ortega* in the context of appeal waivers. All the other circuits that have considered this question have reached the same conclusion: even a habeas petitioner whose guilty plea included an appeal waiver is entitled to a new appeal if counsel failed to file a timely notice of appeal that the petitioner explicitly requested. See *Watson* v. *United States*, 493 F.3d 960 (8th Cir. 2007); *United States* v. *Poindexter*, 492 F.3d 263 (4th Cir. 2007); *United States* v. *Tapp*, 491 F.3d 263 (5th Cir. 2007); *Campusano* v. *United States*, 442 F.3d 770 (2d Cir. 2006); *Gomez-Diaz* v. *United States*, 433 F.3d 788 (11th Cir. 2005); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262 (10th Cir. 2005).[2] These decisions are deeply in tension

---

[2] In none of these cases had there been an evidentiary hearing in the district court. Thus in each case, rather than granting a

and, in many instances, squarely conflict with the Seventh Circuit's, which expressly criticized the majority rule at length and ultimately required a showing in the habeas court that the waiver was involuntary or that there were non-waived grounds for relief.

The genuineness of this conflict is illustrated by the fact that in one case decided before the Seventh Circuit issued its decision here—the Eighth Circuit's decision in *Watson*—the government effectively conceded the issue "because it did not wish to urge a circuit split." *Watson*, 493 F.3d at 963. According to the Eighth Circuit's opinion, the government stated at oral argument that "it had recently become aware that its position ran counter to that of at least two other circuits, which held that the failure of counsel to file a requested appeal amounted to ineffective assistance even if a petitioner had waived his appeal rights in a plea agreement." *Ibid.* (citing decisions from the Second and Tenth Circuits). The *Watson* court's decision also notes that after the oral argument in the case, both the Fourth and Fifth Circuits also joined the Second and Tenth in concluding that *Flores-Ortega* applies even in the case of an appeal waiver. *Id.* at 964 (citing *Poindexter* and *Tapp*, *supra*). The Eighth Circuit went on to adopt the same conclusion, explaining that "[t]his view is most consistent with the Supreme Court's holding in *Flores-Ortega* that a defendant is prejudiced by the forfeiture of an appeal regardless of its apparent merit." *Ibid.*; see also *Poindexter*, 492 F.3d at 272 (it would undermine *Anders* and *Flores-Ortega* to hold "that, by agreeing to waive his right to appeal his sentence,

---

new appeal outright, the Court of Appeals remanded for an evidentiary hearing on whether the petitioner told counsel to file an appeal. The same would likely be necessary here.

Poindexter was agreeing to waive the right to the effective assistance of counsel in pursuing an appeal").

The fact that the Seventh Circuit denied creating a conflict among the circuits is of no moment. The Seventh Circuit acknowledged and expressly criticized the positions taken by the other circuits discussed above. App. 3a-4a. And it held—in direct conflict with these other decisions—that "[b]ecause the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal" *Id.* at 3a.

True, the Seventh Circuit purported to find it unnecessary to directly weigh in on the dispute through an alternate holding at the end of its decision. App. 7a-8a. But this alternative holding is entirely circular and does not eliminate the conflict. The court reasoned that it need not decide whether counsel's failure to file a notice of appeal would entitle Nunez to a new appeal, because Nunez's plea agreement also contained a collateral review waiver that barred relief on collateral review. *Ibid.* But that reasoning ignores the fact that if the plea itself were involuntary in its entirety—an issue that Nunez would have raised on direct appeal—the collateral review waiver would have been invalid as well.

In any case, even if this circular proposition were rhetorically sound, it merely adds to—and does not eliminate—the conflict among the circuits. Collateral review waivers were also present in the cases before the Second, Fifth, Tenth and Eleventh circuits. None of those circuits found such a waiver to be a bar to an award of relief on collateral review—relief in the form of a new direct appeal under *Flores-Ortega*. See *Campusano*, 442 F.3d at 772 n.1 (case involved waiver of right to both appellate review and collateral

review of any sentence within the stipulated guidelines range); *Gomez-Diaz*, 433 F.3d at 790 (case involved waiver of right to both appeal and collateral review without any explicit reference to ineffective assistance as an exception); *Garrett*, 402 F.3d at 1266 n.5; *Tapp*, 491 F.3d at 264, 265-66 (case involved waiver of right to appeal or collateral attack on any basis besides upward departure or above maximum sentence; noting that collateral review waivers were also present in *Campusano*, *Gomez-Diaz*, and *Garrett* and expressly refusing to reach a different result based on the presence of such a waiver). There can be no doubt, therefore, that if this case had arisen in any of these four circuits, petitioner's waiver would *not* have been treated as foreclosing his ineffective assistance claim and barring the relief that would otherwise be available under *Flores-Ortega*.

Finally, the Seventh Circuit's minority view has already had concrete repercussions and places courts within that circuit squarely at odds with courts elsewhere. District courts in the Seventh Circuit have already begun to apply the *Nunez* decision, denying a new appeal to criminal defendants whose attorneys allegedly refused to honor their clients' decision to file a notice of appeal, based on the presence of a plea agreement with an appeal waiver. See *Salas* v. *United States*, No. IP 05-111-H/F-CR-01, 2007 WL 3286611, at *3 (S.D. Ind. Nov. 6, 2007); *Herrmann* v. *United States*, No. 05-3277, 2007 WL 2700161 (C.D. Ill. Sept. 10, 2007).

Indeed, in the *Herrmann* case, the court relied on *Nunez* to vacate an earlier order in which the court had relied on the unanimous precedent in other circuits to conclude that it should hold an evidentiary hearing to further explore the claim that counsel failed to file a requested appeal. *Ibid.* That case pro-

vides a rather dramatic illustration of the impact of the decision in *Nunez* below, which at least one district court has understood to require a result exactly opposite of that reached under the other circuits' precedent.

Thus within the Seventh Circuit—aside from any discussion of a waiver of collateral review—the *Nunez* decision is being interpreted and applied as holding that an "attorney acts properly in honoring [a] waiver of . . . appeal rights in the Plea Agreement," *Id.* at *1. This trend can only be expected to increase now that attorneys in the Seventh Circuit are on notice that there is no need to honor a client's wish to file a notice of appeal so long as an appeal waiver applies. This Court's intervention is necessary to resolve this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

DECEMBER 2007

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-1014
ARMANDO NUNEZ,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 3385—Harry D. Leinenweber, *Judge.*

SUBMITTED JULY 19, 2006—DECIDED JULY 31, 2007

Before EASTERBROOK, *Chief Judge*, and BAUER AND COFFEY, *Circuit Judges.*

EASTERBROOK, *Chief Judge.*

Charged with multiple cocaine offenses, Armando Nunez negotiated a plea bargain: the prosecutor dismissed all counts but one and recommended a sentence at the lowest point in the Guideline range. As part of the deal, Nunez agreed not to appeal or file a collateral attack unless the sentence exceeded the statutory maximum or the waiver clause itself should be deemed invalid. The sentence of 160 months' imprisonment followed the prosecutor's recommendation and is well under the statutory maximum. *See*

21 U.S.C. §841(b). Nunez has never argued that the waiver is invalid. Nonetheless, he told his lawyer to appeal (or so he says; the assertion has been contested, but we shall assume that Nunez did ask). When the lawyer balked, he filed this collateral attack under 28 U.S.C. §2255 charging counsel with providing ineffective assistance.

Although Nunez never asked the district court for leave to withdraw the plea—and in open court assured the judge that the deal was satisfactory and his assent voluntary—he now maintains that the guilty plea was involuntary because he could not understand what his lawyer told him out of court. If the plea was involuntary, then the waiver falls because it is part of the whole package. *See United States v. Wenger*, 58 F.3d 280 (7th Cir. 1995). But the lack of a motion to withdraw the plea means that Nunez must overcome that forfeiture by showing cause and prejudice. (On direct appeal the standard would have been plain error, *see United States v. Vonn*, 535 U.S. 55 (2002), but on collateral attack the forfeiture is complete and the petitioner must meet the higher standard of cause and prejudice. *See United States v. Frady*, 456 U.S. 152 (1982).) Nunez would lose on *any* standard, however, as the district judge concluded.

Nunez contends that he speaks no English, and that, because during some consultations with his counsel an interpreter was not present (or was not used), he could not understand what counsel told him and therefore did not comprehend the plea bargain's terms. That assertion is inconsistent with assurances given to the judge, under oath, when entering the plea. Nunez told the judge— through an interpreter—that he fully understood the plea and the

bargain's terms. The judge asked him detailed questions; his answers evinced knowledge. His counsel explained to the court how the plea had been negotiated and that Nunez often spoke in English and understood their exchanges when interpreters were not present (or were not employed). Nunez told the judge that this was correct.

Defendants cannot obtain relief by the expedient of contradicting statements freely made under oath, unless there is a compelling reason for the disparity. *See, e.g., United States v. Peterson*, 414 F.3d 825, 826–27 (7th Cir. 2005); *United States v. Stewart*, 198 F.3d 984 (7th Cir. 1999); *United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995); *United States v. Ellison*, 835 F.2d 687, 692–93 (7th Cir. 1987). Nunez offers no reason at all; his appellate briefs simply ignore what he told the judge in open court. What is more, if, as the record demonstrates, Nunez fully understood the bargain's terms by the time he stood before the judge, it doesn't make any difference whether he understood all of what his lawyer had said earlier. The plea was voluntary.

Because the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal. The waiver has only two exceptions: an illegally high sentence, and a defect in the waiver itself. A claim of post-sentencing ineffective assistance falls squarely within the waiver.

In saying this, we recognize that six courts of appeals have held that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on his client's request. *See United States v. Campusano*,

442 F.3d 770, 772–77 (2d Cir. 2006); *United States v. Poindexter*, 2007 U.S. App. LEXIS 15360 (4th Cir. June 28, 2007); *United States v. Tapp*, 2007 U.S. App. LEXIS 15343 (5th Cir. June 28, 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195–99 (9th Cir. 2004); *United States v. Garrett*, 402 F.3d 1262, 1265–67 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791–94 (11th Cir. 2005). These decisions all rely on the holding of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), that a criminal defendant has a statutory right to appellate review, and that when counsel utterly frustrates that right by failing to appeal on his client's request, counsel's performance is automatically ineffective. A lawyer who does not show up for trial might as well be a moose, and giving the defendant a moose does not satisfy the sixth amendment. *See United States v. Cronic*, 466 U.S. 648 (1984). The same understanding applies when the lawyer does not show up for appeal.

There is much to be said for this position, because waivers of appeal are not airtight. As we have already observed, a waiver stands or falls with the plea bargain of which it is a part. A defendant who wants a lawyer to argue on appeal that the plea was involuntary has a right to that legal assistance. Moreover, waivers of appeal have different scope. Some—for example, the waiver in *Poindexter*—concern only the sentence; an appeal that calls the conviction itself into question is not foreclosed by such a waiver. Had the district judge imposed a sentence higher than the statutory maximum, Nunez too could have appealed.

A rule that a lawyer must file an appeal on demand, and let the court of appeals sort out whether the defendant is entitled to appellate review, avoids

any need to make nice distinctions during the 10 days allowed for appeal (or on collateral review if the lawyer fails to file the notice). Simplicity is a virtue, and a mechanical rule ("On request, file a notice of appeal") could be a good addition to the Federal Rules of Criminal Procedure whether or not the Constitution demands this outcome.

We confess to some doubt about the constitutional reasoning of the circuits that have located in the sixth amendment a rule that a lawyer is the client's puppet. In *Roe* the Court remarked that a failure to file a notice of appeal "cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." 528 U.S. at 477. Usually that's true, for an appeal can help but not harm the defendant. But filing cannot be called "ministerial" when the defendant has waived any entitlement to appeal, not only in the plea agreement but also in open court. *See* Fed. R. Crim. P. 11(b)(1)(N). There is no constitutional entitlement to revoke a waiver; to the contrary, waivers must be enforced even if the defendant changes his mind. A defendant who waits past the time for appeal (10 days in federal court) to ask his lawyer to proceed cannot expect that this will be done as a "purely ministerial" task, for after 10 days there is no longer a right to appeal; likewise there is no longer a right to appeal following a waiver.

Far from having a ministerial duty to follow his client's (latest) wishes, a lawyer has a duty to the judiciary to avoid frivolous litigation—and an appeal in the teeth of a valid waiver is frivolous. A lawyer also has a duty to his client to avoid taking steps that will

cost the client the benefit of the plea bargain. (That's another reason why filing a notice of appeal, if the client has surrendered that right in exchange for something he values more, such as a shorter sentence, can't be called a "ministerial duty.") A lawyer might have a responsibility to file an appeal if the client indicated a desire to withdraw the plea, for that amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too; but Nunez (who had not moved to withdraw the plea) does not contend that he told his lawyer that he had any desire to achieve that goal by an appeal.

Ordinarily a lawyer cannot make an independent decision about whether an appeal would be frivolous but must follow the procedure outlined in *Anders v. California*, 386 U.S. 738 (1967), and proceed as an advocate until the judiciary agrees with counsel's belief that more litigation would be frivolous. As we explained in *United States v. Eskridge*, 445 F.3d 930, 932 (7th Cir. 2006), however, the *Anders* procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach.

With the waiver in force, counsel's duty to protect his client's interests militates against filing an appeal. *United States v. Whitlow*, 287 F.3d 638 (7th Cir. 2002), and *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001), hold that, when a defendant violates a plea agreement by appealing despite a promise not to do so, the prosecutor may withdraw concessions made as part of the bargain. The prosecutor made substantial concessions to Nunez. An appeal could have put

them in jeopardy, allowing the prosecutor to reinstate the two dismissed charges or ask the district court to increase the sentence on the existing conviction. If it did nothing else, an appeal would have demonstrated that Nunez had *not* accepted responsibility and would have entitled the judge to rescind the discount under U.S.S.G. §3E1.1. A defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for "nothing" is at least harmless.

The sort of appeal that the Supreme Court considered in *Roe* is one where the defendant can gain but not lose. The sort of appeal that Nunez wanted to take was one by which he could lose but not gain. Protecting a client from a lay-person's folly is an important part of a lawyer's job. It will not do to reply, along the lines of *Roe*, that whether to appeal is a decision entrusted to the defendant personally, on which the lawyer may give advice but not act unilaterally. Nunez *had* made a personal decision—a decision not to appeal. That's what the waiver was all about. As we've stressed, a defendant has no right to countermand such a formal choice, and a lawyer faced with inconsistent instructions by his client does not have a "ministerial" duty to follow one rather than the other. The lawyer's duty is to do what's best for the client, which usually means preserving the benefit of the plea bargain.

But we need not decide whether these arguments are a sufficient response to the mandatory-appeal-notwithstanding-the-waiver-of-appeal approach that our colleagues in other circuits have derived from *Roe*. For there remains the question whether Nunez is entitled to relief based on a conclusion that his

lawyer furnished ineffective assistance after the district judge pronounced sentence. Recall that the waiver Nunez negotiated forswears not only a direct appeal but also any opportunity to wage a collateral attack. Ineffective assistance before the plea's acceptance might spoil the plea's validity and thus undermine the waiver. But ineffective assistance *after* the plea (indeed, after the sentence's imposition) cannot retroactively make the plea invalid. Waivers of appeal block constitutional as well as statutory arguments. *See United States v. Behrman*, 235 F.3d 1049 (7th Cir. 2000).

If the plea (and thus the waiver) is valid, an argument that counsel furnished ineffective assistance is among the foreclosed theories. *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999), holds that a claim of ineffective assistance may be open under §2255, but that "the right to mount a collateral attack . . . survives only with respect to those discrete claims which relate directly to the negotiation of the waiver." *See also United States v. Joiner*, 183 F.3d 635, 644–45 (7th Cir. 1999). Nunez's challenge to his lawyer's handling of the appeal has nothing to do with the negotiation of the waiver. Thus Nunez's waiver must be enforced and his collateral attack dismissed whether or not his lawyer should have filed an appeal on demand.

AFFIRMED

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: July 31, 2007

BEFORE:

Honorable FRANK H. EASTERBROOK, Chief Judge

Honorable WILLIAM J. BAUER, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

No. 06-1014

ARMANDO NUNEZ,
Petitioner - Appellant
v.
UNITED STATES OF AMERICA,
Respondent - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 04 C 3385, Harry D. Leinenweber, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

APPENDIX B

In the United States District Court
for the Northern District of Illinois
Eastern Division

Filed Oct. 18, 2005

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARMANDO NUNEZ,

Defendant.

Case No. 04 C 3385

Hon. Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Armando Nunez's (hereinafter, "Defendant") Petition for Writ of Habeas Corpus under 18 U.S.C. § 2255 and his Motion to Supplement.

I. BACKGROUND

Defendant entered into a Guilty-Plea Agreement (hereinafter, the "Agreement") before this Court on December 19, 2002. He was indicted and charged with three counts involving conspiracy and distribution of cocaine. (P.A. at 2). Defendant's counsel, John

M. Cutrone, Esq., negotiated a Plea Agreement on Defendant's behalf and advised him to accept the agreement in light of the substantial evidence compiled against Defendant. Pursuant to the Agreement, the government recommended the dismissal of Counts I and III and that the Court impose a reduced sentence on Count II. In exchange, Defendant pled guilty to Count II, involving a violation of 21 U.S.C. § 846: "conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October 2001 to September 2002, namely, in excess of five kilograms of mixtures containing cocaine...." *Id.*

The Agreement states that during the aforementioned time period, Defendant and several co-conspirators agreed to transport drugs concealed in automobiles from the Chicagoland area to distribution locations throughout Illinois, Indiana, and New Jersey. (*Id.* at 3, 5). The Agreement also states that Defendant drove to New Jersey an average of twice a month over an approximate four-month period to distribute drugs concealed in his vehicle. (*Id.* at 5). On July 11, 2002, Defendant distributed a cocaine mixture to undercover law enforcement. (*Id.* at 6). The Court sentenced Defendant to 135 months in prison and 60 months of supervised release pursuant to his plea agreement. (06/10/03 Tr. at 11).

II. LEGAL STANDARD

For relief under 28 U.S.C. § 2255, a prisoner must demonstrate a "fundamental defect which inherently results in a complete miscarriage of justice" violating the Constitution or laws of the United States. *United States v. Addonizio,* 442 U.S. 178, 185,

99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). A § 2255 motion does not substitute for a direct appeal. Without raising the habeas issue on appeal, a petitioner must demonstrate good cause for and actual prejudice from the failure to raise the issue. *Theodorou v. United States,* 887 F.2d 1336, 1339 (7th Cir. 1989); *see also Williams v. United States,* 805 F.2d 1301, 1305-06 (7th Cir. 1986), *cert. denied,* 481 U.S. 1039, 107 S. Ct. 1978, 95 L. Ed. 2d 818 (1987) (applying this standard to guilty pleas).

III. DISCUSSION

Defendant's petition requests relief on four grounds: (1) ineffective assistance of counsel; (2) the district court's lack of jurisdiction over the case; (3) failure of the district court to construe strictly 18 U.S.C. § 3013; and (4) failure of the district court to construe narrowly United States Sentencing Guidelines Section 2D1.1. Defendant's plea agreement states that "defendant knowingly waives the right to appeal any sentence ... defendant also waives his right to challenge his sentence ... in any collateral attack ... including but not limited to a motion brought under [§ 2255]." (P.A. at 11). So that with respect to grounds two through four, Defendant is foreclosed from bringing these claims in his post-conviction petition.

Further, even if Defendant's claims attacking the jurisdictional legality of his plea agreement and his sentence were not foreclosed, Defendant misunderstands the law and his arguments on grounds two through four are without merit. The United States had proper jurisdiction in this case because of the interstate nature of the drug-crime violations and the

factual connection to Chicago, where this Court sits. Also, Defendant's confusing arguments in his memorandum concerning his sentence and "taxing" under 28 U.S.C. § 3013 are not cognizable claims.

Defendant did not file an appeal in this case on any of the available issues, which include involuntariness or ineffective assistance of counsel. (*See id.*) On March 7, 2005, Defendant filed a motion to supplement his § 2255 petition to include an ineffectiveness of counsel claim regarding his counsels' failure to file an appeal to challenge Defendant's waiver of appellate rights. This amendment is moot because the plea agreement allows Defendant to challenge the voluntariness of his agreement either on appeal or on post-conviction review. (*See id.*) The Court will incorporate his voluntariness arguments into the pending § 2255 petition, which arguments also subsume his ineffective assistance allegations. The Court now considers, on collateral review, Defendant's claims involving the voluntariness of his agreement.

Defendant argues that the Court should revoke his agreement because he does not speak English and he therefore understood "nothing" in his agreement. Defendant's plea agreement is void if the Court finds that it was *not* knowing and voluntary, which due process requires. *See United States v. Gilliam,* 255 F.3d 428, 433 (7th Cir. 2001); *United States v. Lockwood,* 416 F.3d 604, 608 (7th Cir. 2005). Defendant's testimony and the attendant circumstances at his change of plea hearing demonstrate that his plea was knowing and voluntary. (*See* 12/19/02 Tr. at 2). His alleged lack of understanding of English was not an issue at the hearing because a Spanish interpreter was present to assist him. (*Id.* at 2-3). The record also

indicates that Defendant understood certain questions independent of his interpreter and was able to answer those questions sufficiently in English. (*See id.*)

Furthermore, Defendant did not object to or question the provisions of his plea agreement during the hearing. He had the opportunity to do so throughout the hearing either on his own accord or in response to the Court's specially tailored questions, which were designed to elicit Defendant's understanding and voluntariness of his plea. (*See id.*); Fed. R.Crim. Proc. 11. Instead, Defendant admitted responsibility for the factual basis of Count II and indicated that he understood the rights he was giving up by pleading guilty, which included the right to appeal the validity of his plea and his sentence. (12/19/02 Tr. at 18-22).

The Court specifically asked Defendant if (1) the plea agreement was read to him before he signed it; (2) he was convinced he understood all the provisions of the agreement; (3) he was satisfied with having gone over the agreement with Counsel in English; and (4) it also was read to him in Spanish. (*Id.* at 23). Defendant responded with an affirmative "[y]es" to all of these questions except the fourth inquiry. *Id.* When Defendant's counsel, Cutrone, assured the Court that Defendant could communicate in English and understood all the terms of the agreement despite only having reviewed it with counsel in English, Defendant did not disagree. (*Id.*)

Moreover, Defendant did not object to the plea agreement at his subsequent sentencing hearing where he was represented by another attorney, Robert L. Rascia, Esq. (*See generally* 06/10/03 Tr.) He

had a full and fair opportunity to do so during sentencing with the assistance of another Spanish interpreter. (*See id.* at 18-21).

In his petition, Defendant does not provide any evidence or other explanation of why he did not protest against terms of the plea agreement during his change of plea hearing or sentencing hearing. (*See* Pet.; 12/19/02 Tr.; 06/10/03 Tr.) Nor does he explain why the argument in his petition--that he understood "nothing" in English--contradicts his testimony at both hearings. (*See* Pet.; 12/19/02 Tr.)

An affidavit submitted by Cutrone, Defendant's plea hearing counsel, strengthens the argument that Defendant made his plea knowingly and voluntarily. (*See* Cutrone Aff.) Cutrone had multiple conversations in English with Defendant about the provisions of the plea agreement before Defendant's plea hearing. Cutrone's affidavit states that Defendant demonstrated proficiency in understanding and speaking English and never voiced any hesitation over the terms of his agreement, even after Cutrone constantly asked him if he understood. (*Id.* at ¶ ¶ 11-12, 19). Furthermore, during Defendant's change-of-plea hearing, Cutrone, who is an officer of the court, asserted that he and Defendant "communicated mostly in English without a problem." (12/19/02 Tr. at 6).

Moreover, Defendant's multiple signed § 2255 *pro se* filings consist of relatively complex words and ideas in cogent English. Although not a determinative factor in the outcome of his petition, this fact further supports the clearly established record that Defendant's plea was knowing and voluntary.

Accordingly, Defendant's plea agreement comports with the requirements of due process. His claim of prejudice by ineffective assistance of counsel, which he bases on his counsels' failure to file an appeal, is therefore moot. (Supp. Pet. at 1-3; Pet. Reply at 3). Defendant cannot appeal his sentence because he waived his appellate rights as part of his plea. (P.A. at 11).

IV. CONCLUSION

For the reasons stated herein, Defendant's Petition for Writ of Habeas Corpus incorporating his Motion to Supplement is DENIED.

IT IS SO ORDERED.

/s/
Harry D. Leinenweber, Judge
United States District Court

Dated: October 18, 2005.

United States District Court
Northern District of Illinois
Eastern Division

United States of America

v.

Armando Nunez

JUDGMENT IN A CIVIL CASE

Case Number: 04 C 3385

□ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Petition for Writ of Habeas Corpus under 18 U.S.C. § 2255 and his Motion to Supplement is denied.

Michael W. Dobbins, Clerk of Court

Date: 10/18/2005 /s/ Wanda Parker, Deputy Clerk

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 2007

Before

Hon. FRANK H. EASTERBROOK, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

ARMANDO NUNEZ,
Petitioner – Appellant,

No. 06-1014 v.

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 3385
Harry D. Leinenweber, *Judge.*

Order

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on August 31, 2007. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

No. 07-818

In the Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the limited waiver in petitioner's plea agreement of his right to seek collateral relief under 28 U.S.C. 2255 bars his collateral challenge seeking relief on the ground that his attorney provided him with ineffective assistance of counsel by disregarding his asserted direction to file an appeal from his judgment of conviction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 9
Conclusion 22
Appendix—Plea agreement (Dec. 19, 2002) 1a

TABLE OF AUTHORITIES

Cases:

Anders v. *California*, 386 U.S. 738 (1967) 7
Bridgeman v. *United States*, 229 F.3d 589 (7th Cir. 2000) 18, 19
Gomez-Diaz v. *United States*, 433 F.3d 788 (11th Cir. 2005) 11, 13
Jones v. *United States*, 167 F.3d 1142 (7th Cir. 1999) 17
Rodriguez v. *United States*, 395 U.S. 327 (1969) 10
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 7, 10, 11
Salas v. *United States*, No. 2007-cv-417-DFH-WTL, 2007 WL 3286611 (S.D. Ind. Nov. 6, 2007) 20
Stephenson v. *United States*, No. 06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007) 20, 21
Strickland v. *Washington*, 466 U.S. 668 (1984) 10
United States v. *Behrman*, 235 F.3d 1049 (7th Cir. 2000) 19
United States v. *Campusano*, 442 F.3d 770 (2d Cir. 2006) 11, 13

Cases—Continued: Page

United States v. *Garrett*, 402 F.3d 1262 (10th Cir. 2005) 11, 13, 14
United States v. *Poindexter*, 492 F.3d 263 (4th Cir. 2007) 11
United States v. *Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005) 11
United States v. *Tapp*, 491 F.3d 263 (5th Cir. 2007) .. 11, 13
United States v. *Vega*, 241 F.3d 910 (7th Cir. 2001) .. 18, 19
Watson v. *United States*, 493 F.3d 960 (8th Cir. 2007) ... 11

Statutes and guideline:

18 U.S.C. 2 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
28 U.S.C. 2255 ..... *passim*
United States Sentencing Guidelines § 2D1.1 4

In the Supreme Court of the United States

No. 07-818

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 495 F.3d 544. The opinion of the district court (Pet. App. 10a-17a) is not reported in the Federal Supplement, but is available at 2005 WL 2675043.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2007. A petition for rehearing was denied on September 19, 2007 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Northern District of Illinois, peti-

tioner was convicted of conspiring to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. 846. He was sentenced to 135 months of imprisonment, to be followed by 60 months of supervised release. Thereafter, petitioner filed a motion under 28 U.S.C. 2255 collaterally attacking his conviction. The district court denied the motion, Pet. App. 10a-16a, and the court of appeals affirmed, *id.* at 1a-8a.

1. Petitioner and others agreed to transport drugs, which were concealed in automobiles, from the Chicago area to distribution points throughout Illinois, Indiana, and New Jersey. Pet. App. 11a. Petitioner personally drove to New Jersey an average of twice a month over a period of approximately four months to distribute drugs concealed in his automobile. *Ibid.* On July 11, 2002, petitioner distributed cocaine to an undercover law enforcement officer. *Ibid.*

Petitioner was charged in a three-count indictment with conspiring, during two different time periods, to possess a substance containing cocaine with the intent to distribute it, in violation of 21 U.S.C. 846 and 18 U.S.C. 2 (Counts 1 and 2), and distributing a substance containing cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3). Gov't C.A. Br. 3. Petitioner entered into a plea agreement with the government under which petitioner agreed to plead guilty to Count 2 and the government agreed to dismiss Counts 1 and 3 as well as to recommend a sentence at the low end of the applicable range under the Sentencing Guidelines. Pet. App. 11a.

In the plea agreement, petitioner specifically waived all rights relating to trial and "all appellate issues that might have been available if he exercised his right to trial." App., *infra*, 10a. Petitioner also specifically waived his right to appeal "any sentence within the max-

imum provided in the statute of conviction," as well as "the manner in which that sentence was determined." *Ibid.* In addition, in the agreement, petitioner waived his right to challenge by collateral attack "his sentence or the manner in which it was determined." *Ibid.* The agreement excluded from petitioner's waiver the right to make a "claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation." *Ibid.*

At the change of plea hearing, petitioner was provided a Spanish interpreter to assist him. Pet. App. 13a. In the plea colloquy, petitioner admitted to the conduct constituting the offense to which he was pleading guilty. *Id.* at 14a. He stated that he understood the agreement. *Ibid.* The district court specifically asked petitioner if the plea agreement had been read to him before he signed it, to which petitioner answered "Yes," and whether it had been read to him in Spanish, to which he answered "No." Gov't C.A. Br. 8. Petitioner's counsel then informed the court that he had made sure petitioner understood their discussion of the plea agreement in English. *Ibid.* The court then asked petitioner if he was "convinced [he] underst[ood] the provisions of this plea agreement," and whether he was "satisfied with it having gone over it with [his] lawyer in English." *Ibid.* Petitioner responded "Yes" to both. *Ibid.* The court additionally asked petitioner if he understood that he was "giving up [his] right to appeal, direct appeal, of any aspects of [his] case, including the validity of [his] plea and the sentence [he] ultimately receive[d]," and would retain only a right to bring a collateral attack based on "a claim of involuntariness or ineffective assistance of counsel" that is "related to this waiver in the plea agree-

ment." *Id.* at 19-20. Petitioner again responded "Yes." *Id.* at 20.

At sentencing, petitioner was represented by new counsel and again had the assistance of a Spanish interpreter. Pet. App. 14a-15a. Petitioner did not object to the plea agreement at that time despite having the opportunity to do so. *Ibid.* Consistent with the government's recommendation, which conformed to its commitment in the plea agreement, the district court sentenced petitioner at the bottom of the Guidelines range, to 135 months of imprisonment. *Id.* at 11a; Gov't C.A. Br. 6, 12.

2. Petitioner filed a pro se motion for collateral relief under 28 U.S.C. 2255. Petitioner's motion raised a number of claims including counsel's ineffective assistance for failing to challenge federal criminal jurisdiction over the sale of narcotics within the territory of a State, 04-cv-3385 Docket entry No. 1, at 6 and addendum 1 (N.D. Ill. May 13, 2004), the district court's failure to assess the mandatory fee for each offense, *id.* at 5, and its failure to construe Section 2D1.1 of the Sentencing Guidelines narrowly, *id.* at 6. In the motion, petitioner also alluded to the fact that his lawyer failed to file a notice of appeal. *Id.* at 3, 6. In a supplemental filing, petitioner asserted two claims: (1) that his appellate waiver was involuntary because he did not understand English, and (2) that counsel's failure to file a notice of appeal was itself ineffective assistance of counsel. *Id.* Docket entry No. 5, at 2-3 (Mar. 7, 2005) (Section 2255 Supp. Mot.). In his reply to the government's response, petitioner asked the district court to consider "only the issues raised in the Supplemental motion." *Id.* Docket Entry No. 16, at 1 (Sept. 22, 2005) (Section 2255 Reply).

Petitioner's supplemental filing asserted that he had "wished to appeal the ineffectiveness of his lawyer in going into the negotiation in the first place" as well as counsel's failure to utilize an interpreter, and that "[c]ounsel agreed to file the notice of appeal, even though he did not have to do the appeal as the claim was to be against him." Section 2255 Supp. Mot. 2. Petitioner speculated that "counsel failed to file this notice of appeal" because of a conflict of interest "in as much as he was aware the complaint was about his actions or inactions." *Ibid.* After the government's response pointed out that counsel who helped negotiate the plea had withdrawn by the time of petitioner's sentencing and conviction, and therefore had no obligation to file a notice of appeal on petitioner's behalf, see 04-cv-3385 Docket entry No. 15, at 24-26 (N.D. Ill. Sept. 9, 2005), petitioner asserted that it was instead his sentencing counsel, and not the counsel who negotiated the plea, who had been asked, but failed, to file a notice of appeal, Section 2255 Reply 3.

The district court denied the Section 2255 motion. As relevant here, the court held that petitioner's "testimony and the attendant circumstances at his change of plea hearing demonstrate that his plea was knowing and voluntary." Pet. App. 13a. The court reviewed in detail the colloquy between petitioner and the court at his plea hearing, including his specific statement that he was satisfied with having reviewed the plea agreement with counsel in English. *Id.* at 14a. The court noted that petitioner had received the assistance of an interpreter at both the plea and sentencing hearings, but had raised no objection to the plea or its provisions at either. *Id.* at 14a-15a. In light of the court's holding that the plea agreement was valid and enforceable, the court con-

cluded that petitioner's claim that his counsel was constitutionally ineffective because he failed to file an appeal was "moot." *Id.* at 16a. See *id.* at 13a ("because the plea agreement allows [petitioner] to challenge the voluntariness of his agreement either on appeal or on post-conviction review," the district court stated that it would "incorporate his voluntariness arguments into the pending § 2255 petition, which arguments also subsume his ineffective assistance allegations").

3. The court of appeals affirmed. Pet. App. 1a-8a. On appeal, the government argued, with respect to petitioner's failure-to-appeal claim of ineffective assistance, that petitioner had failed to show that he ever asked sentencing counsel to file a notice of appeal. The government noted that petitioner's vague claim that he had made such a request of sentencing counsel was contradicted by his own earlier statement that it was his plea counsel whom he had instructed to appeal. Gov't C.A. Br. 26-28. The government also argued that petitioner could not show prejudice from any failure to appeal because the district court had given full consideration to petitioner's claim that his plea was involuntary, *id.* at 28-29, and correctly rejected that claim as directly contrary to the extensive exchange between petitioner and the district court at the change of plea hearing, *id.* at 16-21.

For purposes of its decision, the court of appeals assumed that petitioner had requested that his counsel file a notice of appeal, although the government contested that assertion. Pet. App. 2a. The court also determined that it was unnecessary to resolve the merits of the question whether counsel's failure to appeal constituted ineffective assistance. Rather, the court held that the waiver of collateral review in petitioner's plea agreement encompassed his claim based on post-sentencing

ineffective assistance of counsel, and that that waiver was valid and binding. *Id.* at 2a-3a, 7a-8a.

The court of appeals acknowledged that six courts of appeals have held that a criminal defense counsel's failure to file a notice of appeal, if requested to do so by his client, constitutes per se ineffective assistance of counsel, even where the defendant has waived his right to appeal. Pet. App. 3a-4a. The court further found "much to be said for this position" since "waivers of appeal are not airtight" and "waivers of appeal have different scope." *Id.* at 4a.

The court nevertheless expressed "some doubt about the constitutional reasoning of those circuits." Pet. App. 5a. The court noted that this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which found per se ineffective assistance in counsel's failure to file a requested appeal, was based on the view that the filing of a notice in that case was "a purely ministerial task." Pet. App. 5a (quoting *Flores-Ortega*, 528 U.S. at 477). The court of appeals reasoned that, where a criminal defendant has waived his right to appeal in exchange for the benefits of a plea agreement, and the agreement would be put in jeopardy by filing an appeal, the filing of a notice is no longer a simple ministerial act. *Id.* at 5a-6a. Instead, the court suggested, at least where the client has not expressed a desire to withdraw from the plea agreement, such a circumstance requires the attorney to reconcile what are, in effect, two inconsistent directions from his client. *Ibid.* The court recognized that counsel normally cannot substitute his judgment for that of the client on whether an appeal is frivolous, but must instead follow the approach described in *Anders* v. *California*, 386 U.S. 738 (1967). Pet. App. 6a. Here, however, the court believed that the *Anders* approach was

inapplicable because petitioner had waived his right to appeal. *Ibid.*

The court of appeals, however, ultimately determined that it "need not decide" the merits of petitioner's ineffective-assistance claim based on counsel's failure to file a notice of appeal because it found the claim barred by petitioner's separate waiver of his right to bring a collateral attack. Pet. App. 7a-8a. The court construed the plea agreement as "forswear[ing] * * * any opportunity to wage a collateral attack," and having reserved the right to raise in a collateral attack only "a defect in the waiver itself." *Id.* at 3a, 8a. On that basis, the court concluded that "[a] claim of post-sentencing ineffective assistance falls squarely within the waiver," *id.* at 3a, and, therefore, "[i]f the plea (and thus the waiver) is valid," petitioner's collateral attack is barred, *id.* at 8a.

Although petitioner challenged the voluntariness of his plea and associated waiver, the court of appeals affirmed the district court's conclusion that petitioner's claim that his plea was involuntary "would lose on *any* standard" of review. Pet. App. 2a. The court explained that petitioner's claim that he did not understand the plea bargain's terms was "inconsistent with assurances given to the judge, under oath, when entering the plea," at which time petitioner "told the judge—through an interpreter—that he fully understood the plea and the bargain's terms," answered the judge's questions in a way that demonstrated understanding, and told the court that he had understood the conversations he had with counsel in English about the plea. *Id.* at 2a-3a. The court observed that petitioner had given "no reason at all" for the disparity between his sworn statements to the district court at the time of his plea and his position in his Section 2255 motion. *Id.* at 3a. Because the plea

was, on any standard of review, voluntary and enforceable, the court concluded that petitioner's collateral attack must be dismissed, regardless of whether his counsel should have filed a notice of appeal "on demand." *Id.* at 8a.

DISCUSSION

Petitioner seeks review (Pet. i) of the question whether counsel for a criminal defendant is per se ineffective if he fails to file a notice of appeal, as requested by the defendant, even in the face of a plea agreement waiving the right to appeal. The court of appeals expressly declined to resolve the question petitioner asks this Court to review, and instead rested its judgment upon a different ground—*i.e.*, its understanding that petitioner had waived his right to bring a collateral attack, a waiver that the court determined was valid and enforceable under any standard. Petitioner does not separately seek review by this Court of the court of appeals' construction of the collateral-attack waiver or the court of appeals' enforcement of that waiver, the only issues that the court of appeals did decide.

Although petitioner does not challenge the court of appeals' reading of the collateral-attack waiver, that reading was not urged by the government and is not supported by the text of the plea agreement. Moreover, that incorrect construction of the plea agreement has been relied upon, and even expanded, in other cases within the Seventh Circuit. Therefore, while the court of appeals' decision does not warrant plenary review by this Court, the government suggests that the Court grant the petition for a writ of certiorari for the limited purpose of vacating the court of appeals' judgment and

remanding for further consideration in light of the government's narrower reading of the waiver's scope.

1. Because the court of appeals did not reach the issue on which petitioner seeks review, and instead relied upon an independent ground to deny the motion for relief under 28 U.S.C. 2255, there is no need for this Court to review the issue in this case. The question as posed in the petition (Pet. i) concerns whether, under this Court's decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), a criminal defense counsel is per se ineffective when he fails to file a notice of appeal on behalf of a client who has waived his right to appeal in a plea agreement, but nonetheless requests the attorney to appeal. *Flores-Ortega* held that a lawyer who disregards a criminal defendant's specific instructions to file an appeal acts in a professionally unreasonable manner, *id.* at 477; see *Rodriguez* v. *United States*, 395 U.S. 327 (1969), and that, with respect to the prejudice prong of the inquiry under *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), the defendant need not show that the appeal would have had merit; it is enough to show that, but for counsel's error, the defendant would have timely appealed, *Flores-Ortega*, 528 U.S. at 484.

Flores-Ortega did not involve, and the Court did not address, the question whether it amounts to ineffective assistance for an attorney to disregard a defendant's direction to file an appeal even where the defendant has explicitly waived his right to appeal in a plea agreement.[1] In the wake of *Flores-Ortega*, some courts of

[1] In discussing whether counsel has "a constitutionally imposed duty to consult with the defendant about an appeal" in a plea-based conviction, the court mentioned as a relevant factor "whether the defendant received the sentence bargained for as part of the plea and *whether the plea expressly reserved or waived some or all appeal rights.*" *Flores-*

appeals have held that, notwithstanding any appeal waiver provision in a plea agreement, counsel provides ineffective assistance when he disregards a defendant's direction to file an appeal. See *United States* v. *Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *United States* v. *Tapp*, 491 F.3d 263, 265-266 (5th Cir. 2007); *United States* v. *Campusano*, 442 F.3d 770, 772-777 (2d Cir. 2006); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193, 1195-1199 (9th Cir. 2005). Other courts have held that a lawyer's failure to comply with a defendant's direction to file an appeal constitutes ineffective assistance notwithstanding that the defendant's plea agreement contains an appeal waiver so long as the defendant has not waived all of his appellate rights. See *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007); *Gomez-Diaz* v. *United States*, 433 F.3d 788, 793-794 (11th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262, 1266-1267 (10th Cir. 2005).

In this case, although the court of appeals expressed reservations about whether counsel's failure to appeal in those circumstances would be constitutionally ineffective, Pet. App. 5a, it did not resolve the merits of that issue, or what relief would be appropriate as a result—the issue that petitioner asks this Court to consider. Rather, the court expressly stated that it "need not decide" the issue because petitioner's Section 2255 motion had to be dismissed for the independent reason that petitioner had waived his right to bring the collateral at-

---

Ortega, 528 U.S. at 480 (emphasis added). But the Court had no occasion to consider in *Flores-Ortega* whether an appeal waiver could limit an attorney's otherwise-absolute duty to file an appeal upon request because the defendant in that case "ha[d] not clearly conveyed his wishes one way or the other," *id.* at 477, and because the defendant had not waived his right to appeal, *id.* at 474.

tack, *id.* at 7a-8a, and that his waiver was, under any standard of review, voluntary and enforceable, *id.* at 2a-3a.

Petitioner contends that the court of appeals' purported "alternate holding" that his present ineffective-assistance challenge is barred by the waiver of collateral review "does not eliminate the conflict." Pet. 21. But, in fact, the decision below does not implicate any conflict. The court of appeals' holding with respect to the collateral-attack waiver is not an "alternative holding," *ibid.*; rather, it is the *only* holding of the court of appeals, which expressly declined to resolve the question petitioner asks the Court to address. Pet. App. 7a ("we need not decide" whether counsel's failure to appeal was ineffective assistance). Because the issue presented in the petition was not resolved below and did not form the basis for the judgment, this case provides no occasion for the Court to address that question.

2. Petitioner does not separately seek review in this Court of the court of appeals' decision that the waiver in his plea agreement barred this collateral challenge. See Pet. i. The question whether a plea agreement can validly waive a collateral challenge to alleged post-plea ineffective assistance would not warrant this Court's plenary consideration even if petitioner had presented it. But the court of appeals' case-specific decision that petitioner *did* waive his current claim rests on a broad reading of the collateral-attack waiver in petitioner's plea agreement that the government did not advocate and that is contrary to the government's understanding of the waiver's scope. Although plenary review of the court's interpretation of specific waiver language is not warranted, the error could produce (and appears already to have produced) broader misunderstandings

about the scope of standard waiver terms. The government therefore suggests that the judgment be vacated and the case remanded for further consideration in light of the government's views of the proper construction of the waiver provision.

a. Even if petitioner did seek review on the question whether a collateral-attack waiver can be enforced with respect to an ineffective-assistance-of-counsel claim based on counsel's failure to file a requested notice of appeal, that issue would not warrant plenary review by this Court. Contrary to petitioner's contention (Pet. 21-22), the court of appeals' holding that a collateral-attack waiver can foreclose a claim of post-sentencing ineffective assistance of counsel does not conflict with the decision of any other court of appeals. Petitioner's assertion of a conflict relies on four cases in which the courts upheld similar ineffective-assistance-of-counsel claims on collateral review notwithstanding the defendant's waiver of his right to collaterally attack his sentence as part of his plea agreement. See *Tapp*, 491 F.3d at 264, 265-266; *Campusano*, 442 F.3d at 772 n.1; *Gomez-Diaz*, 433 F.3d at 790; *Garrett*, 402 F.3d at 1266 n.5. In two of those cases, *Campusano* and *Gomez-Diaz*, the courts describe but do not analyze the collateral appeal waiver, and the waiver in question was expressly limited to a collateral attack on the defendant's "sentence." *Campusano*, 442 F.3d at 772 n.1; *Gomez-Diaz*, 433 F.3d at 790. Although *Tapp* did separately address the collateral-attack waiver in that case, that waiver was also limited to an attack on the petitioner's "sentence." 491 F.3d at 264, 265-266. In *Garrett*, the court noted that "[t]he government has not argued that this [collateral-attack] waiver bars a § 2255 motion based on counsel's failure to file a requested appeal," and went on to explain that "the plain language of

the waiver does not address the type of claim he has raised." 402 F.3d at 1266 n.5. By negative implication, *Garrett* suggests that a collateral-attack waiver that *does* waive post-plea ineffectiveness claims would present a different question.

In this case, the court of appeals specifically determined that petitioner's plea agreement "forswears * * * any opportunity to wage a collateral attack," Pet. App. 8a, with the sole exception of reserving the right to claim "a defect in the waiver itself," *id.* at 3a, such as a claim of "[i]neffective assistance before the plea's acceptance [that] might spoil the plea's validity and thus undermine the waiver," *id.* at 8a. Thus, the court of appeals concluded that "[a] claim of post-sentencing ineffective assistance falls squarely within the waiver." *Id.* at 3a. Because none of the other court of appeals decisions cited by petitioner involved a plea agreement that was interpreted to waive the right to bring a collateral attack concerning post-sentencing ineffective assistance, those decisions do not conflict with the holding of the court of appeals here.

Petitioner argues that the court of appeals' "reasoning ignores the fact that if the plea itself were involuntary in its entirety—an issue that [petitioner] would have raised on direct appeal—the collateral review waiver would have been invalid as well." Pet. 21. But the court of appeals and district court each specifically considered the question of the voluntariness of petitioner's plea, and the court of appeals made clear that it had to do so in order to enforce the waiver against him. Pet. App. 8a ("If the plea (and thus the waiver) is valid, an argument that counsel furnished ineffective assistance of counsel is among the foreclosed theories."). Moreover, although the standard for considering a forfeited

claim of involuntariness is more demanding on collateral review than direct appeal, the court of appeals, noting that fact, specifically held that petitioner's plea was voluntary under "*any* standard." Pet. App. 2a. Thus, petitioner received full consideration of his voluntariness challenge and all the process he was due in light of the collateral-attack waiver, as the court of appeals understood it. Petitioner's argument that he was nonetheless entitled to collateral relief granting him the opportunity to pursue an untimely direct appeal is, in effect, an argument that no collateral-attack waiver, no matter how broadly written, can in fact waive the right to challenge such post-sentencing ineffective assistance of counsel. No court of appeals has so held. There is, therefore, no conflict among the courts of appeals for this Court to resolve, even if petitioner had sought review on that issue.

b. Although petitioner does not challenge the court of appeals' interpretation of the collateral-attack waiver contained in his plea agreement, which is the premise of the court's holding that petitioner's Section 2255 motion was barred, the court of appeals construed the waiver more broadly than the government does. The government's brief on appeal did not argue that petitioner's ineffective-assistance-of-counsel claim was barred by his collateral review waiver. Rather, the United States argued that petitioner's ineffective-assistance-of-counsel claim failed on the merits because (1) petitioner had failed to offer evidence that would support a finding that he did, in fact, ask his counsel to file a notice of appeal, see Gov't C.A. Br. 26-28, and that, (2) even if he had, petitioner was not prejudiced by the failure because the only claim that would have been open to him on appeal would have been an attack on the voluntariness of the

plea agreement itself (and its appellate waiver), and the district court had already rejected that claim after a full hearing on that issue in this Section 2255 proceeding, *id.* at 28-29, a determination that was fully supported on the record, see *id.* at 16-25.

As previously noted, the court of appeals did not decide the merits of petitioner's ineffective-assistance-of-counsel claim, as the government urged, but rather held that the claim was barred by the collateral-attack waiver in petitioner's plea agreement. The United States' brief had accurately represented the plea agreement as having waived petitioner's "right to challenge his sentence or the manner in which it was determined in any collateral attack." Gov't C.A. Br. 6. The waiver provisions state, in full:

> 12. Defendant understands that by pleading guilty he is waiving all the [trial] rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he exercised his right to trial.
>
> 13. The defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowing waives the right to appeal any sentence within the maximum provided in the statute of conviction, or the manner in which that sentence was determined, in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not

> limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

App., *infra*, 10a.

The court of appeals did not, however, read the waiver as limited to collateral attacks on petitioner's "sentence or the manner in which it was determined," App., *infra*, 10a, but instead as "forswear[ing] * * * *any opportunity to wage a collateral attack*," Pet. App. 8a (emphasis added). Based on that construction, the court of appeals held, consistent with its decision in *Jones* v. *United States*, 167 F.3d 1142, 1145 (7th Cir. 1999), that the only ineffective-assistance-of-counsel claim that was excepted from petitioner's collateral-attack waiver was one that relates to "[i]neffective assistance before the plea's acceptance [that] might spoil the plea's validity and thus undermine the waiver." Pet. App. 8a.

The court's reliance on *Jones* was misplaced. In *Jones*, the defendant's cooperation agreement had expressly "waive[d] his right to appeal or contest directly, under 18 U.S.C. § 3742 or [28] U.S.C. § 2255, or otherwise, his conviction and the eventual sentence . . . *on any grounds*, unless the court was to impose a sentence in excess of the statutory maximums . . . or otherwise imposes a sentence in violation of any law." 167 F.3d at 1143 n.1 (emphasis added). Here, by contrast, petitioner's collateral-attack waiver was specifically limited to a collateral challenge to his "sentence or the manner in which it was determined." App., *infra*, 10a. Although it is possible that the court of appeals inferred from the express reservation of petitioner's right to bring "a claim of involuntariness, or ineffective assistance of

counsel, which relates directly to this waiver or to its negotiation," *ibid.*, that the waiver barred all other ineffective-assistance-of-counsel claims, that construction is not supported by the text.[2] The collateral-attack waiver is, by its terms, limited to an attack on petitioner's "sentence or the manner in which it was determined." *Ibid.* The following sentence does not reflect a waiver of any additional class of claims, but expressly states that the earlier waiver does not, and indeed could not under *Jones*, bar a claim of involuntariness or ineffectiveness relating to the plea agreement itself. In our view, that limiting language is not properly interpreted as converting the limited waiver of a collateral attack on the sentence into a broader waiver of all claims other than those that would invalidate the plea agreement itself.

The Seventh Circuit has, in other cases, construed similar waiver language in plea agreements to have a more limited scope. For example, in *Bridgeman* v. *United States*, 229 F.3d 589 (2000), the court considered a waiver provision in which the defendant "agree[d] not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including

---

[2] The district court described the collateral-attack waiver in similar terms in the change of plea colloquy, in which it stated "the only review rights you retain would be what is called a collateral attack, which would allow you to raise a claim of involuntariness or ineffective assistance of counsel," but "only related to this waiver in the plea agreement." See Gov't C.A. Br. 20 (quoting transcript of plea colloquy). The district court's oral description of the plea agreement, however, did not broaden the scope of the waiver as clearly stated in the agreement's text. See *United States* v. *Vega*, 241 F.3d 910, 912 (7th Cir. 2001) (per curiam) (construing a waiver provision in a plea agreement: "The terms of a plea agreement are interpreted according to the parties' reasonable expectations at the time they entered it.").

but not limited to, a proceeding under Title 28, United States Code, Section 2255." *Id.* at 590. The defendant later filed a Section 2255 motion alleging that his guilty plea was involuntary because of ineffective assistance in his attorney's advise about the plea agreement. *Id.* at 591. The court held that the challenge fell outside of the waiver, explaining that "[a] plea agreement that also waives the right to file a § 2255 motion is generally enforceable," but here, the defendant "only agreed not to contest his *sentence*; the plea agreement is silent as to a waiver of any challenge to his underlying *conviction*." *Ibid.* Accord *United States* v. *Behrman*, 235 F.3d 1049, 1051-1052 (7th Cir. 2000) (construing waiver of the right to appeal "any sentence within the maximum provided in the statute(s) of conviction" not to bar a challenge to a restitution order imposed pursuant to a separate statute; "just as we are willing to enforce waivers of appeal, we enforce them only to the extent of the agreement"); *United States* v. *Vega*, 241 F.3d 910, 911-912 (7th Cir. 2001) (per curiam) (construing waiver of right to appeal "any sentence" not to bar an appeal from the post-sentence entry of an amended judgment increasing the sentence). Under the principles applied in those cases, petitioner's waiver of his right to challenge "his *sentence* or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255," App., *infra*, 10a (emphasis added), does not bar a challenge to his attorney's alleged post-sentence ineffective assistance in failing to file a notice of appeal upon request.

Because petitioner has not challenged the court of appeals' interpretation of the plea agreement's waiver provision, that issue would not normally warrant any relief by this Court. In this instance, however, we be-

lieve that vacatur and remand to the court of appeals to reconsider its construction of the waiver in light of the government's views would be appropriate. As noted, see p. 15, *supra*, the government did not urge the court of appeals to hold that petitioner's collateral-attack waiver independently barred his ineffective-assistance-of-counsel claim relating to the failure to appeal and did not urge the broad reading of the waiver provision that the court of appeals adopted.

The court of appeals' sua sponte holding that the terms of petitioner's plea agreement barred this collateral claim of post-sentencing ineffective assistance of counsel has, moreover, been applied in other cases within the Seventh Circuit that have similarly phrased collateral-attack waivers, and in at least one case with no waiver of collateral-attack rights at all.[3] In *Salas* v. *United States*, No. 2007-cv-417-DFH-WTL, 2007 WL 3286611 (S.D. Ind. Nov. 6, 2007), for example, the defendant's plea agreement waived his right to collaterally attack his sentence in the same terms as petitioner's plea agreement did. See *id.* at *1. While the district court recognized that the language of the waiver "does not preclude a collateral challenge by Salas to his conviction," *id.* at *3, it went on to hold that, under the court of appeals' decision in this case, the waiver "renders * * * unavailable" Salas's claim of ineffective assistance of counsel based on counsel's failure to file a notice of appeal, *ibid.* In *Stephenson* v. *United States*, No.

---

[3] Although the court of appeals' opinion does not quote the language of the plea agreement that it construes as having waived all post-plea claims of ineffective assistance of counsel, the district court opinion, which is readily available at 2005 WL 2675043 (N.D. Ill. Oct. 18, 2005), does quote the relevant language, see Pet. App. 12a.

06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007), the court of appeals, after inviting briefing on the effect of the decision in this case, affirmed without discussion the dismissal of a Section 2255 motion raising a similar ineffective assistance of counsel claim, although the plea agreement in that case contained no collateral-attack waiver at all. See U.S. Br. at 9, *Stephenson*, *supra*.[4]

In other circumstances, the issue of the scope of the waiver would implicate only an unpreserved error on a case-specific interpretation of a plea agreement that would not warrant corrective action by this Court. But the court of appeals' published decision in this case concerning standard language appearing in numerous plea agreements may come to be understood as a precedential holding with broader ramifications. In the view of the government, those broader consequences of the court of appeals' holding warrant vacating the judgment and remanding for further proceedings in light of the government's views about the proper construction of the waiver provision in petitioner's plea agreement.

---

[4] We are providing to petitioner a copy of the government's brief in *Stephenson*, *supra*, along with this filing.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the positions articulated by the United States in this brief.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MAY 2008

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CR 871
Judge Harry D. Leinenweber

UNITED STATES OF AMERICA

v.

ARMANDO NUNEZ

[Filed: Dec. 19, 2002]
[Docketed: Dec. 23, 2002]

PLEA AGREEMENT

This Plea Agreement between the United States Attorney for the Northern District of Illinois, PATRICK J. FITZGERALD, and defendant ARMANDO NUNEZ and his attorney, JOHN M. CUTRONE, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

This Plea Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 02 CR 871.

This Plea Agreement concerns criminal liability only, and nothing herein shall limit or in any way waive or release any administrative or judicial civil claim, demand or cause of action, whatsoever, of the United States or its agencies. Moreover, this Agreement is limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities except as expressly set forth in this Agreement. By this Plea Agreement, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and the defendant ARMANDO NUNEZ and his attorney, JOHN M. CUTRONE, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the indictment in this case with conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October, 2000 to October, 2001, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance (Count One), in violation of Title 21, United States Code, Section 846; with conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October, 2001 to September, 2002, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance (Count Two), in violation of Title 21, United States Code, Section 846; and knowingly and intentionally distributing a controlled substance, namely, in excess of 500 grams of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, in vio-

lation of Title 21, United States Code, Section 841(a)(1) (Count Three).

2. Defendant has read the charges against him contained in the indictment in this case and those charges have been fully explained to him by his attorney.

3. Defendant fully understands the nature and elements of the crimes with which he has been charged.

4. Defendant will enter a voluntary plea of guilty to Count Two of the indictment in this case.

5. Defendant will plead guilty because he is in fact guilty of the charge contained in Count Two of the indictment. In pleading guilty to Count Two of the indictment defendant admits the following facts, and admits that these facts establish his guilt beyond a reasonable doubt:

From in or about October, 2001 to in or about September 2002, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant ARMANDO NUNEZ ("NUNEZ"), conspired and agreed with others known and unknown to the Grand Jury, to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, namely, in excess of five kilograms of mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Specifically, during the period from approximately October, 2001 to approximately September, 2002, defendant NUNEZ was part of a drug organization (Drug Organization 2). It was part of the conspiracy that

NUNEZ agreed with his co-conspirators, in exchange for money, to use automobiles to pick-up loads of cocaine in the Chicagoland area, conceal the cocaine within the vehicles, and to distribute the cocaine to locations in and about Illinois and Indiana. On average, NUNEZ picked-up and distributed at least approximately 20 to 50 kilograms per month utilizing hidden compartments within the vehicles, which totaled at least approximately 240 kilograms of cocaine during this time period. It was further part of the conspiracy that at times would pick-up drug proceeds in and about the Chicagoland area, based on sales of cocaine by his co-conspirators to third parties, and then would deliver the accumulated drug proceeds to other co-conspirators in the drug organization. It was further part of the conspiracy that on one occasion NUNEZ accumulated approximately $300,000 in drug proceeds and distributed it other co-conspirators who were members of the drug organization. It was further part of the conspiracy that NUNEZ would use the telephone to discuss drug trafficking with his co-conspirators, and to negotiate and arrange for the purchase and sale of multi-kilograms quantities of cocaine by NUNEZ and his co-conspirators for sale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ and his co-conspirators would and did hide and conceal and attempt to hide and conceal the purposes, objects and acts in furtherance of the conspiracy to avoid detection by law enforcement. All in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

6. The defendant acknowledges that for the purpose of computing his sentence under the United States Sen-

tencing Guidelines, the following conduct, to which he stipulates, constitutes relevant conduct under Section 1B1. 3 of the Guidelines:

A. During the period from approximately October, 2000 to approximately October 2001, defendant NUNEZ was part of a drug organization (Drug Organization #1). It was part of the conspiracy that NUNEZ agreed with his co-conspirators, in exchange for money, to use automobiles to pick-up loads of cocaine in the Chicagoland area, conceal the cocaine within the vehicles, and to distribute the cocaine to locations in and about New Jersey. It was further part of the conspiracy that during an approximate four month period, from approximately July, 2001 to approximately October, 2002, on average, NUNEZ made two trips per month between the Chicagoland area and the New Jersey area, and on each of these eight trips he concealed in the vehicle he was driving approximately four kilograms of cocaine, for a total of approximately 32 kilograms of cocaine, which cocaine he distributed to his co-conspirators for resale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ would use the telephone to discuss drug trafficking with his co-conspirators, and to negotiate and arrange the purchase and sale of multi-kilograms quantities of cocaine by NUNEZ and his co-conspirators for sale to third parties, the proceeds of which sales would be used to pay for the cocaine. It was further part of the conspiracy that NUNEZ and his co-conspirators would and did hide and conceal and attempt to hide and conceals the purposes, objects and acts in furtherance of the conspiracy to avoid detection by law enforcement.

B. On July 11, 2002. NUNEZ knowingly and intentionally distributed a controlled substance, namely approximately two kilograms, net weight, of mixtures containing cocaine, to an Undercover Law Enforcement Agent ("UCA"). One kilogram of cocaine was sold to the UCA for approximately $18,500. A second kilogram of cocaine was given by NUNEZ to the UCA on consignment to sell to third parties, the proceeds of which sales were purportedly to be used by the UCA to pay for the second kilogram of cocaine.

7. For purposes of applying the guidelines promulgated by the United States Sentencing Commission pursuant to Title 28, United States Code, Section 994, the parties agree on the following points:

(a) The amount of cocaine involved in the offense of conviction and relevant conduct for which the defendant is accountable is more than 150 kilograms of cocaine. Therefore, pursuant to Guidelines §2D1.1(c)(1), the base offense level is level 38.

(b) Based on evidence now known to the government, the government and defendant agree, subject to the Court's approval, that Guideline Section 5C1.2 and Title 18, United States Code, Section 3553(f) are applicable, and that the Court therefore shall impose sentence in accordance with the applicable Guidelines without regard to any statutory minimum sentence. In addition, the offense level is reduced by two levels, pursuant to Guideline Section 2D1.1(b)(6).

(c) Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this pro-

vision, and if the defendant continues to accept responsibility for his actions, within the meaning of Guidelines §3E1.1(a), a two level reduction in the offense level is appropriate.

(d) Defendant has notified the government timely of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, within the meaning of Guideline §3E1.1(b); an additional one-point reduction in the offense level is therefore appropriate, provided the court determines the offense level to be 16 or greater prior to the operation of Guideline §3E1.1(a)

(e) Based on the facts known to the government, the defendant's criminal history points equal 0 and the defendant's criminal history is I.

(f) The defendant and his attorney and the government acknowledge that the above calculations are preliminary in nature and based on facts known to the government as of the time of this Agreement. The defendant understands that the Probation Department will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Sentencing Guidelines calculation. Accordingly, the validity of this agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations.

8. Errors in calculations or interpretation of any of the guidelines may be corrected by either party prior to sentencing. The parties may correct these errors or misinterpretations either by stipulation or by a state-

ment to the probation office and/or court setting forth the disagreement as to the correct guidelines and their application. The validity of this Agreement will not be affected by such corrections, and the defendant shall not have a right to withdraw his plea on the basis of such corrections.

9. Defendant understands that the count to which he will plead guilty carries a maximum penalty of life in prison and a maximum fine of $4,000,000. Defendant further understands he is subject to a statutory minimum sentence of 10 years imprisonment, if it applies. In addition, defendant understands that this charge also carries a term of supervised release of at least five years and up to any number of years, including life, which the court may specify, as well as any restitution which the Court my order.

10. Defendant understands that in accord with federal law, Title 18, United States Code, Section 3013, upon entry of judgment of conviction, the defendant will be assessed $100 on the count to which he has pled guilty, in addition to any other penalty imposed. Defendant agrees to pay the special assessment of $100 at the time of sentencing with a check or money order made payable to the Clerk of the United States District Court.

11. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be a jury trial or a trial by the judge sitting without a jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a

jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

(b) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, and considering each count of the indictment separately, it was persuaded of defendant's guilt beyond a reasonable doubt.

(c) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count of the indictment separately, whether or not the judge was persuaded of defendant's guilt beyond a reasonable doubt.

(d) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and its attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(e) At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If the defendant desired to do so, he could testify in his own behalf.

12. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he exercised his right to trial.

13. The defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute of conviction, or the manner in which that sentence was determined, in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

14. Defendant understands that the indictment and this Plea are matters of public record and may be disclosed to any party.

15. Defendant understands that the United States Attorney's Office will fully apprise the District Court

and the United States Probation Office of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

16. Defendant agrees to repay to the United States the undercover drug buy money utilized on July 11, 2002 as described above, in the amount of $18,500, as a special condition of supervised release.

17. At the time of sentencing, the government shall recommend that the Court impose a sentence at the low end of the applicable guideline range, or the statutory mandatory minimum sentence, whichever is higher.

18. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and, subject to the limitations of the Sentencing Guidelines, may impose the maximum penalties as set forth in paragraph 9 above. The defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, the defendant will have no right to withdraw his guilty plea.

19. After sentence has been imposed on Count Two to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining counts in the indictment.

20. Defendant understands that his compliance with each part of this Plea Agreement extends throughout and beyond the period of his sentence, and failure to abide by any term of the Plea Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government,

at its option, may move to vacate the Plea Agreement, rendering it null and void, and thereafter prosecute the defendant not subject to any of the limits set forth in this Agreement, or to resentence the defendant. The defendant understands and agrees that in the event that this Plea Agreement is breached by the defendant, and the government elects to void the Plea Agreement and prosecute the defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

21. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

22. Defendant agrees this Plea Agreement shall be filed and become a part of the record in this case.

23. Should the judge refuse to accept the defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound thereto.

24. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: [December 19, 2002]

/s/ PATRICK J. FITZGERALD by MSP
PATRICK J. FITZGERALD
United States Attorney

/s/ JOHN H. NEWMAN
JOHN H. NEWMAN
Assistant United States Attorney

/s/ ARMANDO NUNEZ
ARMANDO NUNEZ
Defendant

/s/ JOHN M. CUTRONE
JOHN M. CUTRONE
Attorney for defendant

94

(3)

FILED
MAY 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-818

In the Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY IN SUPPORT OF CERTIORARI 1

A. The decision below decisively sets forth the Seventh Circuit's approach to the appeal waiver issue and has been applied as binding precedent. 2

B. Even if the Government's reading were correct, the decision below would still conflict with those of other circuits. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Anders v. *California*,
386 U.S. 738 (1967) 3, 4

Campusano v. *United States*,
442 F.3d 770 (2d Cir. 2006) 3-4, 9

Gomez-Diaz v. *United States*,
433 F.3d 788 (11th Cir. 2005) 9

Herrmann v. *United States*,
No. 05-3277, 2007 WL 2700161
(C.D. Ill. Sept. 10, 2007) 4-5

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) ..... *passim*

Salas v. *United States*,
No. 1:07-cv-417-DFH-WTL,
2007 WL 3286611
(S.D. Ind. Nov. 6, 2007) 5-6

Stephenson v. *United States*,
No. 06-2887 (7th Cir. Sept. 27, 2007),
petition for cert. pending, No. 07-9267
(filed Dec. 26, 2007) 1, 6, 7, 8

United States v. *Garrett*,
402 F.3d 1262 (10th Cir. 2005) 9

United States v. *Tapp*,
491 F.3d 263 (5th Cir. 2007) 9

REPLY IN SUPPORT OF CERTIORARI

The Government does not deny that the Seventh Circuit's analysis of appeal waivers conflicts with that of several other circuits. And while the Government contends that the decision here rested exclusively on an alternate ground, it concedes that the alternate ground was erroneous. Indeed, the Government itself suggests that certiorari should be granted and the decision vacated and remanded for consideration *without* the erroneous alternative holding.

Although petitioner would certainly appreciate the opportunity to reassert his claim before the Seventh Circuit, there is no reason to delay plenary review. The Seventh Circuit's view is abundantly clear. Its decision in this case explains in detail that a criminal defendant who has waived appeal as part of a plea agreement can no longer claim that his counsel's failure to file an appeal on demand violated his Sixth Amendment rights. Although the court ended its decision with an alternate holding—based on the plea agreement's waiver of collateral review—that fact has not stopped district courts from applying the decision below as binding in cases that do *not* involve waivers of collateral review. And if any doubt remained about this, the Seventh Circuit itself resolved it once and for all when it applied the decision below to deny relief in *Stephenson* v. *United States*, No. 06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007)—which involved *only* an appeal waiver and no waiver of collateral review.

The question presented in this petition is already ripe and appropriate for plenary review. Indeed, there is no reason to believe that the Seventh Circuit will change its mind on the question presented without this Court's guidance. The Court should grant

the petition in this case, either on its own or in combination with the petition in *Stephenson*. Alternatively, and at the very least, the Court should accept the Government's suggestion of granting certiorari and vacating and remanding the Seventh Circuit's decision for further consideration.

A. The decision below decisively sets forth the Seventh Circuit's approach to the appeal waiver issue and has been applied as binding precedent.

1. The decision below contains nine full paragraphs of discussion on why, in the presence of a plea agreement waiving an appeal, a defendant whose lawyer failed to file a notice of appeal when requested cannot claim that the lawyer was constitutionally ineffective. Pet. App. 3a-7a. This decision did *not* reserve judgment on the issue, as the Government suggests. Opp. 11-12. To be sure, the Seventh Circuit stated that it "need not decide whether [its] arguments are a sufficient response" to the approach of its sister circuits because of an additional factor—a waiver of the right to seek relief on collateral review. Pet. App. 7a. But with or without that additional factor, the Seventh Circuit left no doubt about its conclusion about the appeal waiver itself. Under such circumstances, plenary review is appropriate.

The Seventh Circuit flatly concluded that "[b]ecause the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." Pet. App. 3a.[1] This is in direct con-

---

[1] This paragraph's reference to an "illegally high sentence" as an exception to "the waiver" (Pet. App. 3a), reveals that "the waiver" that "knocked out" Nunez's claim was, in fact, the appeal waiver: an illegally high sentence was a stated exception to

flict with the approach followed by other circuits: namely, that under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), a defendant is entitled to a new appeal if he asked his lawyer to file a notice of appeal and his lawyer failed to, regardless of whether an appeal waiver may bar some or even all arguments raised in that new appeal.

The Seventh Circuit also pronounced below that in a case involving an appeal waiver, a lawyer has a duty to refrain from what other circuits hold he *must* do: performing the ministerial task of filing a notice of appeal if the client unequivocally demands one. According to the Seventh Circuit, "[f]ar from having a ministerial duty to follow his client's (latest) wishes, a lawyer has a duty to the judiciary to avoid frivolous litigation—and an appeal in the teeth of a valid waiver is frivolous." Pet. App. 5a. The Seventh Circuit could not make its views much clearer. Indeed, the court characterized the rule of other circuits as "locat[ing] in the sixth amendment a rule that a lawyer is the client's puppet." Pet. App. 5a. That characterization of other circuits' reading of *Flores-Ortega* bespeaks more than "doubt": it is a definitive and strongly pejorative rejection.

Additionally, the decision below unequivocally announced that "the *Anders* [v. *California*, 386 U.S. 738 (1967),] procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach." Pet. App. 6a. This passage is directly contrary to the Second Circuit's decision in *Campusano* v. *United States*, which rested its reading of

---

the appeal waiver but not to the collateral review waiver (see Opp. 10a).

Flores-Ortega in part on the potential value of the *Anders* procedure to a defendant who has ostensibly waived an appeal. See 442 F.3d 770, 774-75, 776-77 (2d Cir. 2006).

Then there is the broad statement that to the extent *Flores-Ortega* was based on the argument that "whether to appeal is a decision entrusted to the defendant personally," that principle is inapplicable where there is an appeal waiver. Pet. App. 7a. That is because, according to the Seventh Circuit, an appeal waiver means a defendant has already "made a personal decision—a decision not to appeal"—which he "has no right to countermand" later on by telling counsel to file a notice of appeal. Pet. App. 7a. This sweeping language can only mean that an attorney can and should ignore a client's command to file a notice of appeal if the client's guilty plea included an appeal waiver.

In short, the Seventh Circuit has set forth a lengthy and strongly worded discussion that leaves no doubt as to where it stands on the application of *Flores-Ortega* to a defendant whose plea agreement contains a waiver of the right to appeal. Whatever else the Seventh Circuit said, this discussion cannot help but have the force of binding law—and creates a sharp conflict in the circuits on the issue. All indications are that without guidance from this Court, the Seventh Circuit will not change its mind.

2. Lower courts in the Seventh Circuit have treated the decision below as controlling precedent on the effect of an appeal waiver, irrespective of any collateral review waiver. No lower court has yet adopted the Government's narrow reading.

In *Herrmann* v. *United States*, for example, the district court had initially followed other circuits' read-

ing of *Flores-Ortega* by granting an evidentiary hearing to the petitioner. No. 05-3277, 2007 WL 2700161 (C.D. Ill. Sept. 10, 2007). But it reversed course and cancelled the hearing based on the decision below in this case:

> The Seventh Circuit Court of Appeals . . . has now determined that a defendant does not receive ineffective assistance of counsel if: (1) the defendant has waived his right to file an appeal in his plea agreement, (2) the defendant instructs his attorney to file a notice of appeal anyway, and (3) the attorney fails or refuses to file a notice of appeal. . . . The decision in *Nunez* is controlling here. Herrmann waived his appeal rights in his plea agreement and then instructed his attorney to file a notice of appeal anyway. The attorney's refusal or failure to file the notice of appeal was effective assistance of counsel as a matter of law.

2007 WL 2700161, at *1. The district court did not note or rely on the presence of any waiver of collateral review.

The case of *Salas* v. *United States* involved a waiver of both collateral review and appeal, with language very similar to the plea agreement in this case. See No. 1:07-cv-417-DFH-WTL, 2007 WL 3286611 (S.D. Ind. Nov. 6, 2007). But *Salas* ultimately rejected the petitioner's ineffective assistance claim based not on the collateral review waiver, but on the waiver as a whole. It expressly relied on the discussion of appeal waivers in the decision below:

> As to Salas' claim that his attorney failed to file a notice of appeal, ... [w]ith the waiver provision of the Plea Agreement in place in

> Salas' case, . . . the recent ruling in *United States* v. *Nunez*, 495 F.3d 544 (7th Cir. 2007), renders this last contention of ineffective assistance unavailable. "Because the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." *Id.* at 546. The basis of this view is that "there is no longer a right to appeal following a waiver." *Id.* at 547.

2007 WL 3286611, at *3. Again, the district court read the decision below to hold that an appeal waiver by itself bars any ineffective assistance claim on collateral review under *Flores-Ortega*.

These cases show beyond doubt that the Seventh Circuit's pronouncements on the effect of an appeal waiver are being applied as binding authority. Even now, defense lawyers in the Seventh Circuit are not required to file an appeal when their client demands it—if, in the lawyer's judgment, the appeal would be barred by a waiver of appeal in a plea agreement. The resulting conflict in the law requires this Court's intervention.

3. Even the Seventh Circuit itself has treated the decision below as controlling on the issue of the effect of an appeal waiver. The petitioner in *Stephenson* v. *United States*, No. 06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007), claims he asked his lawyer to file a notice of appeal after he pleaded guilty, and that the lawyer failed to do so. As the Government admits, Stephenson's plea agreement waived his right to appeal but not his right to collateral attack: the plea agreement contained "no collateral-attack waiver at all." Opp. 21. Under the reading the Government has asserted in its opposition to certiorari here, the Seventh Cir-

cuit's decision below in *Nunez* should not have controlled the result in *Stephenson*. Yet the Seventh Circuit in *Stephenson* asked for briefing on the effect of *Nunez*—and then summarily affirmed the denial of Stephenson's petition after receiving that briefing.

The Government's position in *Stephenson* before the Seventh Circuit was evidently quite contrary to what it has argued in this Court. Its position paper contended that the decision in this case controlled because "petitioner's claim fell outside the limited permissible exceptions to his appeal waiver." *Stephenson* Opp. 6. It also characterized the difference between appeal and collateral attack waivers as "slight differences in the language." *Ibid.*

Since then, the Government's position in *Stephenson* has taken a peculiar turn. Its opposition to certiorari in *Stephenson* now advances the supposition that the Seventh Circuit in that case must have "rest[ed] its holding on the same basis as its decision in *Nunez*, that is, that petitioner's waiver also gave up his right to file a collateral attack." *Stephenson* Opp. 8. In other words, the Government asks this Court to assume that the Seventh Circuit in Stephenson made a fundamental mistake about the facts of that case.

There are no signs of such a mistake. Rather, the most natural inference to draw is that that the Seventh Circuit simply applied as binding precedent the appeal waiver analysis found in the decision below here. After all, that is exactly what the Government asked it to do.

Judge Easterbrook, the author of the opinion below in this case, was also a member of the *Stephenson* panel. See *Stephenson* v. *United States*, 06-2887 (7th

Cir. Sept. 27, 2007) (unpublished order). In light of the focus on the collateral review waiver at the close of the opinion in *Nunez*, surely Judge Easterbrook as its author would have demurred from summary affirmance in *Stephenson* had he understood the decision below to require the presence of a collateral review waiver. His joinder in the *Stephenson* summary affirmance is inconsistent with the Government's limited reading of the decision below.

The Government concedes that the Court should vacate and remand because the decision below has been and may again be applied as "a precedential holding with broader ramifications." Opp. 21; *Stephenson* Opp. 10. That is true. Yet the Government also asks this Court to believe that the "broader ramifications" of the Seventh Circuit's holding extend only to the effect of pattern plea agreement language, not to the effect of an appeal waiver on counsel's obligations. This contention is belied by the fact that the lower courts, the Government before the Seventh Circuit in *Stephenson*, and (evidently) the Seventh Circuit itself in *Stephenson* all have agreed that the decision below establishes Seventh Circuit law on appeal waivers and ineffective assistance. There is no reason for this Court to wait for the Seventh Circuit to say so again before it grants plenary review to resolve the conflict among the circuits.

B. Even if the Government's reading were correct, the decision below would still conflict with those of other circuits.

Even if the decision below did turn on the waiver of collateral review, the Seventh Circuit still departed from the analysis of at least four other circuits on the correct scope of *Flores-Ortega*'s application. Those circuits remanded based on *Flores-Ortega* even

though the petitioners' plea agreements contained both appeal and collateral review waivers. See *United States* v. *Tapp*, 491 F.3d 263, 265-66 (5th Cir. 2007); *Campusano* v. *United States*, 442 F.3d 770, 772 n.1, 777 (2d Cir. 2006); *Gomez-Diaz* v. *United States*, 433 F.3d 788, 790, 792-93 (11th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262, 1266-67 & n.5 (10th Cir. 2005).

The Fifth Circuit in *Tapp* explicitly rejected the notion that a collateral review waiver could have any greater effect than an appeal waiver where the petitioner's counsel had failed to honor an explicit request for a notice of appeal. *Tapp* joined the decisions in *Campusano*, *Gomez-Diaz*, and *Garrett*, which *Tapp* read correctly to hold that "the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal *and collateral review*." 491 F.3d at 266 (emphasis added).

All these cases involved waivers of collateral attack on the petitioners' sentences, much like Petitioner's. Opp. 13. Contrary to the Government's suggestion, there is nothing in these decisions suggesting they turned on any particular interpretation of the waiver's language.[2] And notwithstanding the pres-

---

[2] The Tenth Circuit in *Garrett* granted relief in the face of an even broader collateral review waiver than Nunez's—it also covered challenges to Garrett's guilty plea—but the Tenth Circuit did not consider any possible effect of that waiver because the Government had not raised it. 402 F.3d at 1266 n.5. The Government concedes that it did not rely on the collateral review waiver in this case either, Opp. 15, 20, so the *sua sponte* analysis of collateral review waiver in the decision below is hardly consistent with *Garrett*. As to *Garrett*'s reference to the absence of any particularly relevant language in the collateral review waiver, Opp. 13-14, the Tenth Circuit appears to have pointed this out merely to emphasize the propriety of giving effect to the Government's issue waiver.

ence of a collateral review waiver in all four cases, all four decisions granted relief under *Flores-Ortega* in the form of an evidentiary hearing.

The Seventh Circuit denied petitioner the same relief that other circuits have granted under functionally identical facts. Thus, under any reading, the Seventh Circuit's decision has created a stark circuit split about the interaction between *Flores-Ortega* and plea agreement review waivers, even if the Government is correct that the reasoning below turned on the presence of a collateral review waiver rather than a waiver of appeal.

CONCLUSION

The petition for a writ of certiorari should be granted for plenary consideration, either on its own or in combination with the petition in *Stephenson*. Alternatively, the Court should grant both petitions for certiorari and vacate and remand for reconsideration in light of *Flores-Ortega* itself or, at a minimum, for reconsideration in light of the Government's position on the limited scope of the collateral review waiver.

Respectfully submitted.

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

MAY 2008